

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CARLA MARIE BARTLETT and)
JON WILLIAM BARTLETT,)
PLAINTIFFS,) CASE NO. 2:13-cv-170
vs.) SEPTEMBER 30, 2015
E. I. du PONT de NEMOURS AND COMPANY,) 8:30 A.M.
DEFENDANT.)

)

VOLUME NO. 12
TRANSCRIPT OF THE PROCEEDINGS OF THE JURY TRIAL
BEFORE THE HONORABLE EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT CHIEF JUDGE
COLUMBUS, OHIO

FOR THE PLAINTIFF:

Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A.
By: James M. Papantonio, Esq.
Ned McWilliams, Jr., Esq.
Christopher Paulos, Esq.
Timothy O'Brien, Esq.

316 South Baylen Street, Suite 316
Pensacola, Florida 32502

Douglas & London, PC
By: Gary J. Douglas, Esq.
Michael A. London, Esq.
Rebecca Newman, Esq.
Alicia P. Ellsaway, Esq.
59 Maiden Lane, 6th Floor
New York, New York 10038

Taft Stettinius & Hollister
By: Robert A. Bilot, Esq.
David J. Butler, Esq.
1800 Firststar Tower
425 Walnut Street
Cincinnati, OH 45202

1 Schlichter, Bogard & Denton, LLP
2 By: Roger C. Denton, Esq.
3 Ashley Brittain Landers, Esq.
4 100 South Fourth Street, Suite 900
5 St. Louis, Missouri 63102

6 The Cochran Firm
7 By: David E. Haynes, Esq.
8 1100 New York Avenue, N.W.
9 Suite 340, West Tower
Washington, D.C. 20005

10 Cory Watson Attorneys
11 By: Nina Towle, Esq.
12 2131 Magnolia Avenue South
13 Birmingham, Alabama 35205

14 FOR THE DEFENDANT:

15 Squire Patton Boggs LLP
16 By: Damond R. Mace, Esq.
17 C. Craig Woods, Esq.
18 Stephanie E. Niehaus, Esq.
19 Stephen Fazio, Esq.
20 Aaron T. Brogdon, Esq.
21 4900 Key Tower
22 127 Public Square
23 Cleveland, Ohio 44114

24 - - -

25 Proceedings recorded by mechanical stenography,
transcript produced by computer.

LAURA SAMUELS
FEDERAL OFFICIAL COURT REPORTER
85 MARCONI BOULEVARD, ROOM 302
COLUMBUS, OHIO 43215
TELEPHONE NUMBER: 614-719-3245

1 WEDNESDAY MORNING SESSION

2 SEPTEMBER 30, 2015

3
4 Thereupon, the following proceeding was held in
5 chambers:

6 THE COURT: So, we have three depositions to review?

7 MR. O'BRIEN: Yes, Your Honor.

8 THE COURT: Or four to be exact.

9 MR. O'BRIEN: As I had indicated -- I'm sorry -- I had
10 an opportunity to review the Flarhety recast. Hudson is still
11 ripe with opinion and hearsay. There is still a lot of stuff
12 about the precision and accuracy of the testing and then what
13 did DuPont tell you they wanted, and that's hearsay. So, we
14 still maintain our objection, Your Honor, as to the entirety of
15 the Flarhety deposition.16 MS. NIEHAUS: Your Honor, I mean, we did what we were
17 instructed to do. We pared it back; it is now 12 minutes. It
18 is limited to background for what he did and what he --19 THE COURT: Do you have something that I could follow
20 for what you are proposing? I have read the whole deposition,
21 but I don't know the selected parts.

22 LAW CLERK: I gave it to you yesterday.

23 THE COURT: Oh, all right, then maybe I do have it. I
24 don't have it handy if I do.

25 MS. NIEHAUS: What I do have is --

1 THE COURT: Just give me -- I am looking for a flavor,
2 to be honest with you.

3 MS. NIEHAUS: Yes. This is anything that's in gray is
4 what we have agreed to remove.

5 THE COURT: All right. So, what's left?

6 MR. MACE: Non-gray is what we have narrowed it to.

7 THE COURT: So, we have got the hearsay issue again.
8 I am looking at Page 128 and 129. You start talking about the
9 type of work they have done in the past, quality assurance,
10 matrix effects.

11 MS. NIEHAUS: Well, that's how he did the testing for
12 DuPont --

13 THE COURT: Right.

14 MS. NIEHAUS: -- and that's the method of testing that
15 was used.

16 THE COURT: So, beyond the hearsay issue, what do you
17 see as the problem here?

18 MR. O'BRIEN: Comments about precision and accuracy of
19 the testing, which are opinions. It is not like -- is it four
20 inches by six inches, which would be a fact. It is the subject
21 of analysis, was it precise and was it accurate.

22 THE COURT: Okay. So, we have got that issue. Then,
23 the hearsay issue, how do you respond to that?

24 MS. NIEHAUS: The hearsay issue or the precision and
25 accuracy issue?

1 THE COURT: I think I understand the precision and
2 accuracy.

3 MS. NIEHAUS: Okay. Well, I mean, what DuPont told
4 him and what he understood DuPont to have told him to do is
5 very relevant to -- I mean, the issue of whether DuPont was
6 intentionally falsifying its results.

7 THE COURT: I mean, usually the hearsay is relevant,
8 that's a given, but I mean, what he did is not hearsay, but
9 what they told him, that's what I want to focus on.

10 MS. NIEHAUS: Well, I mean -- so, you are looking at
11 128, I think, Your Honor?

12 THE COURT: Yeah, that's probably where it starts. I
13 have a received call from Mary Kaizer. Yeah, that part is not
14 hearsay, but then it goes on to say "she said". We can purge
15 the hearsay.

16 I mean, did she come on a visit? That's not hearsay.
17 Did you have a conversation? That's not hearsay. What she
18 said is. So, let's take the hearsay out, and let's go back to
19 the other issue right now.

20 MR. MACE: And on that, Your Honor, it is not so much
21 an opinion that he is giving, he is talking about the QA, QC
22 process he used to try to insure a good result. It is the
23 factual of what he did. It is his personal observation.

24 THE COURT: The issue is not whether he could
25 testify -- he could -- but it is the designation that we are

1 talking about. So, he is talking about normal practice.

2 And, of course, the accuracy is the only reason for his
3 testimony, right? So, if we exclude that, I mean, there is
4 really not a whole lot of relevance, is there?

5 MS. NIEHAUS: Well, it is his belief as to the
6 accuracy of the testing and his belief as to what DuPont wanted
7 him to do. I mean, it is the case that we cited in our
8 opposition, Your Honor, where the fact consultant was permitted
9 to testify about his own measurements of the trailer. I don't
10 know if you recall the case that we cited in our opposition to
11 motion in limine Number 5 -- I don't remember the name of it
12 off the top of my head --

13 THE COURT: You don't?

14 MS. NIEHAUS: Gerling, maybe? But don't hold me to
15 that. But, you know, the consultant was permitted to testify
16 about his own measurements, whether they complied with
17 standards.

18 MR. O'BRIEN: Yeah, but that's facts.

19 MS. NIEHAUS: That's fact testimony.

20 THE COURT: I can see this a couple of different ways.
21 I mean, it would have been so much easier, I think, to depose
22 him as an expert, and this whole thing would disappear.

23 MS. NIEHAUS: We don't see him as a expert,
24 Your Honor.

25 THE COURT: So, we need a decision. So, go ahead.

1 You get the last word.

2 MR. BILOTT: Our concern, Your Honor, if you look at
3 the language that was used by Mr. Flarhety, it is clear that
4 they were intending to track the language from the expert
5 report on the plaintiff's side about precision, accuracy,
6 representativeness, sensitivity -- those are all -- anything
7 dealing with those kinds of assessments is pure expert opinion,
8 and they have an expert, Dr. Snyder.

9 MR. MACE: We removed all of that though, Your Honor.
10 And the part where he went through each of those terms and what
11 they meant -- even though I would say that that is still
12 factual testimony, we removed all of that.

13 THE COURT: I think I have gotten this in terms of
14 what your positions are, but give me a second here.

15 (Judge is marking the deposition.)

16 THE COURT: All right. So, I am taking out the
17 hearsay and, you know, generally describing -- a test taken is
18 not by itself expert testimony, but he bleeds into that a
19 couple of places here when he is describing what's coming out.

20 Quantifiable, that's an opinion.

21 But in terms of what DuPont wanted from him, that will
22 stay in. In terms of, you know, was he asked to throw the
23 results, basically, and he says emphatically no. That has been
24 some issue in the case. So, I kind of skimmed back as much
25 expert stuff as I can.

1 MR. O'BRIEN: Your Honor, so that was their
2 designations. We, of course, have counter designations, which
3 I would request some guidance on because, obviously, we are
4 going to recast our counter designations in light of the
5 Court's ruling, if it is not responsive or if it was responsive
6 to what has been excluded.

7 One of the major objections that defendant has presented
8 to our counter designations is a lack of a chain of custody.
9 And that's a fact. So, I would just request guidance that the
10 failure to have a chain of custody of the samples can be
11 permitted to be displayed to the jury or shown to the jury.

12 THE COURT: In other words, you are questioning about
13 documents that show what his samples were?

14 MR. O'BRIEN: Right, the samples he received because
15 he is purporting to say these were samples from "X", and he has
16 no chain of custody to prove that's true.

17 THE COURT: And you have objected to that?

18 MR. O'BRIEN: No. We presented the chain of custody
19 just to impeach his testimony that -- that this is what it
20 purports to be, samples from --

21 THE COURT: Well, can I see it? I just don't want to
22 decide it in the abstract.

23 MS. NIEHAUS: Your Honor, so here is the testimony.

24 THE COURT: Well, I mean, I need to digest this, too.

25 MS. NIEHAUS: That's fine.

1 THE COURT: Do you have a clean copy of what your
2 counter designations are and what your objections are?

3 MR. O'BRIEN: Your Honor, we can get that to you, but
4 I have the combined one. I have theirs combined with mine, but
5 I can give you our PC.

6 MS. NIEHAUS: This will include some of what you just
7 struck, but this is what we had originally exchanged with
8 plaintiff, counter designations in blue here.

9 MR. MACE: I think what Mr. O'Brien is suggesting is
10 he will truncate that to just what he is offering.

11 MS. NIEHAUS: Okay. And they would be our objections
12 to their counter designations. And the chain of custody piece,
13 I mean what is left of Mr. Flarhety's designations, I don't
14 believe there is any indication of where the samples came from,
15 just that he was sampling. So, the chain of custody issue, he
16 said it came from here, and it actually didn't -- there is no
17 direct testimony about that anyway.

18 THE COURT: Again, you have seen it, and I haven't. I
19 need to look at it so that I have an idea what the issue is,
20 okay?

21 Then, we have -- I want to get into both Graham and
22 Sykes.

23 And let me just start by saying -- I guess there is -- I
24 guess we could call it post stipulations. I have been giving
25 these instructions on both the livestock and birth defects, but

1 that doesn't mean the issue is agreed upon. I don't mean to
2 imply that, particularly when it comes to DuPont's conduct.
3 But the issue with both of these is whether they are opinions
4 or not, right?

5 MS. NIEHAUS: Well, they are experts.

6 THE COURT: They are experts. But I thought one of
7 the complaints is that they weren't designated as experts in
8 this case?

9 MR. PAPONTONIO: No, it was that the deposition
10 testimony was not designated in time in compliance with the
11 Court's CM 09. That was the issue.

12 The second issue is they are available. And so under FR
13 32, they haven't shown a lack of availability. So, it is not
14 proper for a retained expert that they have control of to play
15 the discovery deposition of that expert. And we relied upon
16 that, particularly, in light of the fact that there was no
17 deposition designation for these.

18 The other objection -- group objections is, what is the
19 relevance of this? In other words, is it to prove the truth of
20 the limiting instruction that the Court has already given on
21 both of these issues, that is the birth defect and the cattle?
22 So, you know, for all of these reasons, Your Honor, we think
23 that if a witness is going to offer this opinion, it ought to
24 be live so that a foundation can be laid as to the relevance of
25 the testimony.

1 THE COURT: Well, the jury has heard some testimony
2 about both of these topics, so the fact is -- and we don't have
3 quite a stipulation. We are close to it. That doesn't bar
4 you. As long as the evidence is competitive and not
5 cumulative, I won't decide it on that basis that you can't
6 offer this.

7 MR. MACE: If I can summarize on his three points --

8 THE COURT: Let me finish.

9 MR. MACE: Okay.

10 THE COURT: But the issue about live, why can't they
11 be here?

12 MR. MACE: Well, it is because -- Your Honor, we had
13 moved to try to keep these issues out completely. Your Honor
14 has come up with a ruling that basically has given some
15 limiting instructions but left open for the plaintiffs to put
16 in evidence on DuPont's response, what was DuPont's response to
17 this in evaluating DuPont's conduct. So, it is a very, very
18 narrow -- these experts were initially designed to cover the
19 whole waterfront. What we have done is truncated what we are
20 designating to just on the issue of the response.

21 But, Your Honor, has discretion under Rule 32 -- I think
22 it is (b) -- 2(e) something -- to allow this under appropriate
23 circumstances. We think these are appropriate circumstances
24 because of the somewhat unique situation that we are in. The
25 main part of the expert's opinion has now been resolved by the

Vol. 12 - 12

1 limiting instruction, but since we have allowed the plaintiffs
2 to get into DuPont's response -- so, each of these experts talk
3 about what DuPont's response was. We tried to narrow the
4 designations down to I think --

5 THE COURT: My recollection with regards to the
6 birthing issue, I think that's been made very clear to the
7 jury, nobody has claimed that. We have had a lot more
8 discussion about the cattle. The ruling you are referring me
9 to is --

10 MR. PAPONTONIO: 32(b).

11 MR. MACE: 32, you said?

12 MR. PAPONTONIO: I seem to remember, Your Honor. I
13 agree. It is a discretionary issue.

14 THE COURT: Okay. The party may use for any purpose
15 the deposition of a witness.

16 Are you talking about availability of a witness or by an
17 expert?

18 MR. PAPONTONIO: That's the problem here, Judge.

19 These are expert witnesses.

20 MR. MACE: It is (e)(1) here (pointing). I'm sorry,
21 Mike.

22 THE COURT: Okay. So, unavailable witness on motion
23 and notice of exceptional circumstances make it desirable in
24 the interests of justice and with due regard in the importance
25 of live testimony in open court to permit the deposition.

1 That's what you are asking to do?

2 MR. MACE: Yes, Your Honor.

3 THE COURT: And to even consider that, I have to know
4 why they can't be here.

5 MR. MACE: That's because they have these surgical
6 schedules and things, and they are many states away.

7 THE COURT: But one is a veterinarian, right?

8 MR. MACE: One is a veterinarian, yes, sir.

9 THE COURT: And the other one is retired?

10 MS. NIEHAUS: He is semi-retired. He still has clinic
11 twice a week.

12 THE COURT: In West Virginia?

13 MS. NIEHAUS: No, no. He is in California.

14 THE COURT: And the veterinarian is in?

15 MR. MACE: The East Coast -- I am not sure if it is
16 Delaware.

17 MS. NIEHAUS: I don't know where he is.

18 MR. PAPONTONIO: If I could respond? It is the same
19 problems we run into, it is getting people here. There is no
20 exceptional circumstances here. There really is none at all.
21 As a matter of fact, the approach to this case has been to try
22 to -- and again, it is just lawyering, I am not taking
23 exception to it -- but to try the case without the experts
24 showing up, without cross-examining, is just not fair.

25 THE COURT: But I mean, I am just reading this. This

Vol. 12 - 14

1 is a rule, five parts. One is just beyond 100 miles within the
2 subpoena power of the Court. But you are not relying on that?

3 MR. PAPONTONIO: No, sir. But, I mean, that's true.

4 MR. O'BRIEN: But they have control of the witness.
5 That's for someone you don't have control of. They have
6 control, they pay them tens of thousands of dollars.

7 MS. NIEHAUS: It goes back to what we talked about
8 with Flarhety, though, the issue of unavailability outside 100
9 miles. It is not whether we have made any effort to bring them
10 here, extraordinary effort to bring them here, it is whether we
11 have actively prevented them from being here.

12 THE COURT: What makes this hard is these are two
13 issues that I think of as extremely collateral to the matter.
14 You know, we have these limiting instructions that tried to
15 keep them fenced out. It didn't do it entirely. I think their
16 testimony should be relatively short, in all honesty, but on
17 the other hand, there has to be due process here. I want to
18 task you to find out if they can be here. Let's answer that
19 question first. I am assuming they are not coming on today, in
20 any event, even with the depositions.

21 MR. MACE: No, sir.

22 THE COURT: All right. That's the best we can do with
23 that. All right. That's all that I have. Anything else?

24 MR. BILOTT: Your Honor, there was one issue. I know
25 we raised it yesterday with the sidebars with Dr. Playtis

1 yesterday, and that's this line between fact witness testimony
2 and expert testimony. And to try to avoid a lot of sidebars
3 today, we just want to make clear what our concerns are with
4 two of the witnesses, the first two witnesses today, Dr.
5 Dourson and Mr. Hartten. And with Dr. Dourson --

6 THE COURT: These are not disclosed as experts?

7 MR. BILOTT: Correct. And just so the Court is aware,
8 Dr. Dourson was the toxicologist from TERA, which we have heard
9 a lot about who worked on the CATT team report. Dr. Dourson
10 was previously disclosed by DuPont in the original Leach case
11 as an expert who was going to come in and talk about the CATT
12 team report, how it was designed, how it was developed, the
13 reasonableness of the number, etc. In this case, Dr. Dourson
14 has not been disclosed as an expert.

15 And our concern is, we have seen the CATT team report a
16 number of times. DuPont had a toxicologist on that team, Dr.
17 Kennedy and could have brought Mr. Kennedy in as a toxicologist
18 to talk about how this was derived, whether it is reasonable,
19 whether the number was adequate, what was known at the time,
20 etc. They have chosen not to bring Dr. Kennedy. Instead, they
21 are bringing Dr. Dourson, but again, only as a fact witness.

22 THE COURT: And his medical background is?

23 MR. BILOTT: He is a toxicologist.

24 THE COURT: So, he is an undisclosed expert, but you
25 are going to bring him on as a fact witness?

1 MR. BILOTT: Yeah, and our concern, Your Honor, we
2 want to make sure he is not discussing the adequacy of that
3 CATT team number, how it was derived, whether it was reasonable
4 or not, whether it represents what was known at the time.
5 Those are all expert opinions.

6 THE COURT: Let's hear from them.

7 MR. MACE: Yes, Your Honor. I am planning a narrow
8 examination for Dr. Dourson. And it is really to rebut these
9 allegations that were made by the plaintiffs' experts that
10 these CATT teams was a bunch of individuals who weren't
11 qualified, had conflicts of interest.

12 THE COURT: He will come on and give a different view
13 of the process?

14 MR. MACE: Right. His observations from being
15 personally involved, how he got involved, the different people
16 involved.

17 THE COURT: So, none of that is expert testimony at
18 that point? So, you are not planning on opinions about the
19 numbers arrived and standards set and so on?

20 MR. MACE: No, sir.

21 MR. BILOTT: We didn't want the CATT team put up as an
22 expert report of Dr. Dourson and him walking through it and
23 telling the jury this is how we did it and this is why it was
24 reasonable. So, that would be expert testimony, in our view,
25 Your Honor.

1 THE COURT: Well, the process does not seem to be in
2 any way off limits.

3 MR. MACE: And I have been trying to notify counsel
4 the night before, but last night turned into this morning. So,
5 the only exhibits I am planning to use -- I am not sure who is
6 covering him on your side -- is his CV. I was going to use the
7 CATT report and signature pages from the CATT report.

8 THE COURT: On the CVs, we have an understanding that
9 you want them to all go back? I have done it both ways. It is
10 all or nothing.

11 MR. MACE: I want them all to go back.

12 MR. PAPONTONIO: No, no, Judge. It is all hearsay.

13 THE COURT: Some of these CVs in these cases go for
14 100 pages and rather than have someone read through it all,
15 they can stipulate. But they all go back or to none go back.
16 It is not going to be selective.

17 MR. PAPONTONIO: Judge, we prefer they not go back.

18 MR. MACE: And we prefer they all go back.

19 THE COURT: Well, you haven't put an expert on yet.
20 Your feeling is your direct was sufficient and you don't
21 want -- you know, the problem is you are going to end up having
22 Mr. Mace spending a lot of time on the CV.

23 MR. BILOTT: Well, Your Honor, when plaintiff went
24 through the expert qualification, I think it was done in a
25 pretty efficient way. It can be done fairly briefly.

1 THE COURT: Well, I just want to say to you, if it not
2 going in, you decide how much you want to use on the
3 credentials. Normally, I would say don't use a whole lot, but
4 if we are not sending the CV back, I will give it more leeway.

5 MR. BILOTT: But, again, Dr. Dourson is not one of the
6 experts.

7 THE COURT: Yeah, that's right.

8 MR. MACE: But his CV was relevant in that the
9 allegation was made that these people were basically industry
10 shells and they didn't know they were doing.

11 THE COURT: I understand. But his CV would not go
12 back for sure in this case if he is not an expert, but
13 certainly, he can testify to it.

14 MR. MACE: All right. The only other thing that is
15 not one of the marked exhibits, and I am only using it as a
16 demonstrative is their funding list that is off of their
17 website.

18 MR. O'BRIEN: One in 2001?

19 MR. MACE: 2002.

20 MR. O'BRIEN: 53 percent of the industry?

21 MR. MACE: You picked out that number.

22 MR. O'BRIEN: I am sure we will hear the other number,
23 too.

24 MR. PAPONTONIO: Judge, I wanted to get something on
25 the record because we are guests in your court. And it

1 bothered me yesterday when I left the courtroom. We, I think
2 on behalf of all of us, have tried to cooperate, do everything,
3 provide documents, give notice when a slide is going to go up.
4 Yesterday, I put that slide up totally by mistake. It is
5 because we have a lot of cooks in the kitchen. And I didn't
6 want the Court to think that there was any intent there. We
7 are going to be working together a long time, and I don't
8 operate like that.

9 THE COURT: No, I didn't take it that way.

10 MR. PAPONTONIO: I also -- the thing with the three
11 cancers, what I was trying to say, I was trying to go back to
12 the doctor's testimony, that he talked about the different
13 types of kidney cancer.

14 And the third thing I can assure you I did not mean to
15 call Mr. Brogdon "Mr. Brodhead".

16 I didn't want to leave the courtroom -- these things
17 bothered me anyway because I think we have done a pretty good
18 job of everybody getting along. And I think credibility is
19 critical. I wanted to clear the air.

20 THE COURT: I think that reviewing these before we go
21 in, too. There are so many documents. I can see making a
22 mistake on what is displayed.

23 MR. MACE: And I didn't mean to get riled yesterday,
24 Judge, and I didn't mean there was any intent behind that, but
25 it is just this has been a hard-fought battle.

1 THE COURT: I noticed.

2 MR. MACE: And we have things we have agreed to.

3 MR. BILOTT: Your Honor, we have talked about Dr.
4 Dourson. Just again, to try to avoid a bunch of sidebars today
5 with Mr. Hartten, it is a similar issue that we had with Dr.
6 Flarhety. Hartten has done a lot of water sampling for DuPont,
7 has overseen a lot of the activity with DuPont, going out and
8 taking water samples. And, again, as you have already
9 indicated, he can talk about what he did, what he collected.
10 But he was previously disclosed by DuPont in other cases as an
11 expert on these methods. We just don't want him, again,
12 crossing that line. So, that's our only concern with Mr.
13 Hartten.

14 MR. MACE: Your Honor, to clean up issues that neither
15 one should take too much time. One is with regard to one of
16 the witnesses today, Dr. Cohen. So, he has given some
17 testimony in the State legislature in Nebraska and in Congress
18 about fetal tissue issues. This would be a highly sensitive
19 issue to the jury and has no bearing on any issues in this
20 case. But similar to the Court's exclusion of gun control for
21 one of the plaintiff's experts, we would ask that plaintiff be
22 prohibited from inquiring about his testimony on fetal tissue.

23 THE COURT: It doesn't tie into this case at all, does
24 it?

25 MR. MACE: No.

1 MR. PAPONTONIO: Gary needs to know that.

2 MR. BILOTT: Okay.

3 MR. MACE: And the fourth thing, Your Honor, I know we
4 have been throwing an awful lot at the jury and you and
5 everybody else involved. But let me give one to counsel.

6 When we were asking for instructions, and there was
7 quite a bit of process between the parties and the Court to
8 come up with what you were going to tell the jury about the
9 general causation stipulation. We have gone back and looked at
10 the record the numerous times it has been described to the
11 jury, and I know it is under the heat of fire, but it has
12 gotten looser and looser as time has gone on in this trial, but
13 two of the things that were critical for us, that Your Honor
14 had agreed to, is that we would tell them the year, that these
15 findings were made in 2012 because timing is important, in
16 evaluating the conduct of DuPont, and number two, capable of
17 causing --

18 THE COURT: Well, let them read it. We will talk
19 about it again. We will talk before I give the instruction
20 again.

21 MR. BILOTT: Is DuPont proposing a different limiting
22 instruction than what was agreed to?

23 MR. MACE: No, we just want the one read the way it
24 was agreed to.

25 (End of chambers discussion.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Thereupon, the following proceedings were held in open court with jurors present at 9:04 a.m.

THE COURT: Good morning, ladies and gentlemen. Welcome back. I'm sorry to report that Mr. Quisumbing is sick this morning. I want to thank Ms. Sherry Nichols for filling in for him. She's normally with Magistrate Judge Deavers.

With that, DuPont may call its next witness.

MR. MACE: Thank you, Your Honor. The defense calls Dr. Michael Dourson.

(Witness sworn.)

THE COURT: Mr. Mace, whenever you're ready, you may proceed.

MR. MACE: Thank you, sir.

MICHAEL DOURSON, PH.D.

Called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACE:

Q. Good morning, Doctor.

A. Top of the day to you.

Q. Could you state your name, please?

A. Michael Leonard Dourson.

Q. Where do you currently work?

1 A. University of Cincinnati College of Medicine.

2 Q. What do you do there?

3 A. I'm a research professor in environmental health. And
4 we do risk assessment, risk research and then risk
5 communication to the public.

6 Q. Could you please take us through your educational
7 degrees.

8 A. I got my bachelor's of biology at University of
9 Wittenberg in Springfield, Ohio. Then I went down to the
10 University of Cincinnati and got a doctorate in toxicology from
11 the College of Medicine, the place I now have returned to work.
12 I also along the way got certified in toxicology, American
13 Board of Toxicology certification. And I've had some executive
14 training with the U.S. government.

15 MR. MACE: May I approach the deputy clerk, Your
16 Honor?

17 THE COURT: You may.

18 BY MR. MACE:

19 Q. Doctor, we've handed you what's been marked as Exhibit
20 D2455. Do you recognize that?

21 A. Yes, I do.

22 Q. What is it?

23 A. That's my resumé.

24 Q. If we could bring that up, please. Will you bring up,
25 please, from the top down through the employment?

1 Doctor, there's some letters after your name. What's
2 the Ph.D.?

3 A. That's doctor of philosophy in toxicology.

4 Q. The DABT?

5 A. Diplomate of the American Board of Toxicology. That's
6 one of the certifying bodies.

7 Q. ATS?

8 A. The Academy of Toxicological Science, another certifying
9 body.

10 Q. Could you take us through, let's start at the bottom on
11 your employment and take us through your employment history
12 briefly.

13 A. Sure. Briefly.

14 MR. DOUGLAS: Your Honor, I hate to interrupt but I
15 want some clarification if we could have a quick side-bar.

16 THE COURT: You may stand if you wish, ladies and
17 gentlemen.

18 I'll see you at side-bar.

19 - - -

20 Thereupon, the following proceeding was held at side-bar:

21 THE COURT: I think the matter you're going to bring
22 up we just discussed.

23 MR. DOUGLAS: I apologize for not being there. But I
24 just want to be sure but since it's not going to go to the jury
25 whether it's proper to display it on the screen at all.

1 THE COURT: I don't remember what we did with your
2 witnesses. Did we do that?

3 MR. DOUGLAS: I didn't use any resumés.

4 MR. MACE: I would still argue it goes back but,
5 regardless, I should be able to use it as a demonstrative.

6 THE COURT: It's not going to be an exhibit. Without
7 an agreement it won't be an exhibit. I prefer they all go
8 back. We can still do that if you wish. He's going to testify
9 to this anyway.

10 - - -

11 Thereupon, the following proceedings were had in open
12 court:

13 BY MR. MACE:

14 Q. If you could continue with your employment history.

15 A. I got my Ph.D. from University of Cincinnati in 1980.
16 Then went across the street and worked for the Environmental
17 Protection Agency as a staff-level toxicologist; worked in EPA
18 for 15 years at various positions, as you can see. Did some
19 time in Washington, D.C.

20 Q. Let me just ask a few specifics. So the acceptable
21 daily intake group, what did that entail?

22 A. Well, back in 1984 we had the National Academy of
23 Science came up with a new way of managing risk assessment in
24 the federal government. There was a lot of confusion. USEPA
25 took that to heart and one of the things they did is they put

1 together an acceptable daily intake group within our unit to
2 summarize risk values of ADIs that we had already done and that
3 group interacted with other EPA groups that were doing similar
4 work. That led to some interagency work groups with this
5 particular idea, ADI, acceptable intake of the chemical in
6 mind.

7 Q. You have methods evaluation development. What did that
8 entail?

9 A. Part of the National Academy of Sciences' work had to do
10 with new ways to assess risk and so commonly what we've done is
11 we don't experiment on people, we experiment on animals and try
12 to judge the safe level of a chemical from the animal exposure.
13 And the animals, of course, are treated ethically. The point
14 being is we do this for all chemicals because all chemicals are
15 toxic. There's always new methods and new approaches to do
16 this better. That's what our group is charged with doing.

17 Q. You mentioned the National Academy of Sciences a couple
18 times. What is that group?

19 A. Well, it's a -- the National Academy of Sciences is a
20 nonprofit group that does a lot of work for the federal
21 government but it's high level -- they're scientists from all
22 walks of life but they're the A team, the top of the line,
23 usually, and they will do different tasks. So one of them was
24 to develop this idea of risk assessment in the federal
25 government managing the process. That was one of their tasks

1 to do that.

2 Q. Then you went to methods evaluation and development.

3 What was that?

4 A. We talked about the developing methods a little bit
5 already. But after that was, I went to Washington, D.C. and
6 spent a year there in the pesticides and toxics team.

7 Q. What did that involve?

8 A. What that involved was I was part of research and
9 development. EPA is a large organization, and research and
10 development has a lot of aspects to it. One of the
11 coordinating functions that I served as a chief of this team is
12 to talk to our counterparts in EPA's office at Pesticides and
13 Toxic Substances and take the research that folks were doing in
14 that part of EPA and translate it over to the needs of the
15 folks that were evaluating pesticides and chemicals, toxic
16 chemicals like in your window spray. What's a safe level of
17 that? And so we would -- I was doing the translation between
18 the two EPA groups.

19 Q. Let's go up to this one, the systemic toxicants
20 assessment branch. What did that group?

21 A. After I did my gig in Washington, D.C. I returned to my
22 home office in Cincinnati, Ohio and that particular group was
23 charged with doing assessments for safe levels of chemical in
24 water. We also did Superfund site risk assessment work there
25 and we had a variety of tasks that worked for primarily EPA's

1 program offices, the Office of Water and the Office of Solid
2 Waste and Superfund.

3 Q. Then you've got toxicology excellence for risk
4 assessment. What's that group? How did it get started?

5 A. Okay. So, mid-level managers are being bought out by
6 EPA. Bill Clinton was offering these buyouts. I had been 15
7 years in the federal government, learned a lot but was looking
8 for something perhaps different so I took the buyout, which was
9 pretty meager in retrospect, and ended up starting a nonprofit
10 organization. To get an Ohio nonprofit is quite easy. It's
11 \$25 at the time. But then we had to get a 501(c)3 tax
12 exclusion. We ended up getting that. For the last 20 years
13 we've been doing work with various parties.

14 About two-thirds of our work is government and other
15 nonprofits, and about one-third is industry or industry
16 nonprofits. And what we do is we build collaborations between
17 parties. We've got a lot of examples of that.

18 Q. What's the mission of that group?

19 A. It's to provide information to protect the public
20 health.

21 Q. And now you said you're over at the University of
22 Cincinnati?

23 A. Yeah. I've been there for two months as a research
24 professor. I'm still learning what that means.

25 Q. All right. If we could go lower on the page.

1 In terms of teaching, have you lectured in graduate
2 level?

3 A. Yeah. I've actually done -- since we're close to the
4 University of Cincinnati and the College of Medicine, and since
5 I'm an alumni, they've invited me to give lectures every year,
6 nearly, since I've been out. Well, probably not the first
7 couple years. But after I started with TERA I would go over
8 and lecture on a routine basis. I've given some lectures to
9 high school students. That's a challenge. I admire teachers.

10 Q. Sir, your CV is 30 pages. I'm not going to go through
11 all of it.

12 A. Thank you.

13 Q. We're trying to make some progress here. But if we
14 could look over at page 13. You have a section on research
15 risk assessment publications. Have you done quite a few papers
16 and peer-review literature on that?

17 A. Yeah. It's probably near 150. I lost count of them
18 after 100. So I just put in what I think is important.

19 Q. You have a section over on page 28 about awards. Have
20 you received a number of awards regarding risk assessment?

21 A. Right. And a number those awards are team efforts. So
22 I think the very first one it was a team effort. We had four
23 different groups that we worked with that do that particular
24 website for kids chemical safety. The groups are the
25 Cincinnati Poison Control Center, our group, Harvard Center for

1 Risk Analysis and NSF International which is a nonprofit in Ann
2 Arbor that certifies chemicals that touch water. If you open
3 your refrigerator door you'll see NSF certification for the ice
4 maker. So that's what they do. And we've got together and put
5 this website together.

6 Q. I wanted to ask about a particular one over on the next
7 page, page 29. In 2002. Could we bring that one up?

8 Environmental Stewardship Award. What was that?

9 A. That was the work that we did with other group -- other
10 folks on the team to look at the C-8, the CATT team, the
11 assessment team. After we did the report, afterwards, myself
12 and Andy Maier got this award. It was quite gratifying. It
13 was also unexpected.

14 Q. Do you have a copy of the certificate with you?

15 A. Yeah. Actually I brought that.

16 Q. And that was from whom?

17 A. That was from the State of West Virginia.

18 Q. Now, with regard to your work at EPA did you have any --
19 first of all, are you familiar with the term IRIS?

20 A. IRIS, yeah. Very much so.

21 Q. What does it stand for and what is it?

22 A. The Integrated Risk Information System. It's a system
23 designed by EPA staff. I had the lead of the group that
24 developed it but there was teams of people that review the ADIs
25 at the time and now they're called reference doses, but made

1 sure that everybody in EPA agreed to it. Once we all agreed,
2 unanimous consensus, then we put it on the Integrated Risk
3 Information System.

4 Q. How were you involved with it?

5 A. Two ways. My team was -- I was staff lead of the method
6 evaluation and development staff, we were the group that put
7 out the actual IRIS. And the first time we did it was on
8 e-mail and it was very archaic. You can only scroll down. You
9 couldn't go backwards. It was designed only for EPA staff
10 because we found out that our ADIs was not the same between
11 groups. It was actually pretty embarrassing. We had 40
12 chemicals where we actually did the same evaluation and 39 of
13 the 40 were different. That was pretty embarrassing. We got
14 it together and tried to harmonize it. That was the principle
15 behind the IRIS thing.

16 Part of my effort was to lead the team, to build it,
17 build the database. The second part of the effort was I
18 chaired a group that actually did the certification of the ADIs
19 and then we culled and referenced those. We had a hard time
20 harmonizing so we changed the name and very slowly everybody
21 came into harmony.

22 Q. In all that work that you just described with respect to
23 IRIS, Integrated Risk Information System, that was all done
24 while you were at EPA?

25 A. Yeah. All that work was done, right.

1 Q. Sir, were you traveling last week?

2 A. Yeah. Actually I was.

3 Q. Where were you?

4 A. I was in Geneva.

5 Q. For what purpose?

6 A. Switzerland. I was offered to -- selected, I suppose,
7 to attend a joint meeting of the Food Agricultural
8 Organization. So it's a part of the World Health Organization.
9 And another unit of the World Health Organization to do
10 pesticide reviews. So this group gets together once a year for
11 two weeks. I didn't realize it was a two-week assignment at
12 the time I accepted it last year, but nevertheless. And what
13 they do is they review the toxicology or exposure information
14 for about 20 pesticides. And when they do that, at the end of
15 the Thursday you walk out of that meeting and they've got the
16 report done. It's pretty impressive actually the way they do
17 it. And then that report gets edited and things and then it
18 gets released. Sometime later, different member countries, the
19 World Health Organization will use that information to set safe
20 levels of pesticides for their crops. So people can use the
21 pesticide. As long as it doesn't go above a certain level then
22 that's safe use.

23 Q. All right. Let me focus this, sir. You mention the
24 CATT team and the jury's heard a little bit about that. We've
25 been at this for two weeks, going on three.

1 A. Okay.

2 Q. Let's bring up Defense Exhibit D613.

3 MR. MACE: May I approach, Your Honor?

4 THE COURT: You may.

5 BY MR. MACE:

6 Q. Sir, do you recognize this as the final report that came
7 out of the CATT?

8 A. Yes, it is.

9 Q. And do you understand, sir, that you're here to give
10 fact testimony regarding your involvement in the CATT team?

11 A. Yes.

12 Q. How did you get involved in the CATT team?

13 A. One or more of my staff, either myself or one of our
14 staff, were approached by a contractor with the State of West
15 Virginia to see if we could develop a small group to study this
16 issue.

17 Q. If you could turn over, please, to page 6. The second
18 paragraph. Could you blow that up?

19 It talks about the CATT team being tasked with
20 investigating the toxicity of C-8; developing provisional risk
21 factors; and, establishing human health protective screening
22 levels for air, water and soil. Does that sound like an
23 accurate description of part of what you were doing?

24 A. Yes.

25 Q. Go over to page 8, please. Blow up the third paragraph.

1 The CATT toxicologists met on May 6 and 7, 2002 at EPA
2 offices in Cincinnati, Ohio. Does that comport with your
3 memory?

4 A. Yes.

5 Q. And with respect to TERA, which you've talked about and
6 the jury's heard a little bit about, at page 9, it says TERA is
7 a nonprofit corporation dedicated to the best use of toxicity
8 data to the development of risk values. All the nonTERA
9 toxicologists on the CATT, whether from government agencies or
10 industry, were in unanimous support of including TERA in this
11 project.

12 Is that accurate to your memory?

13 A. Well, the first line is accurate. I'm not so sure I
14 knew about the second part.

15 Q. Let's turn over to the next page, page 10. Why don't we
16 bring up from the top of the page down to Mr. Briggs.

17 So this meeting was held over two days, May 6 and 7,
18 between these toxicologists?

19 A. Yes.

20 Q. Were you familiar -- are you familiar today or were you
21 familiar back at the time with these -- let's start with Mr --
22 how does he say that?

23 A. Cicmanec. John Cicmanec.

24 Q. Dr. Cicmanec from USEPA. Are you familiar with him?

25 A. I'm very familiar with Dr. Cicmanec. I worked on the

1 ADI work group with him and when we traveled on occasion, we
2 had to room together to save money.

3 Q. What about Dr. Rotenberg?

4 A. I know Dr. Rotenberg a little bit less well. He's in
5 Region 3 Philadelphia office. If he walked in here, I'd
6 recognize him. But I didn't work with him on a day-to-day
7 basis.

8 Q. Jennifer Seed, Dr. Seed?

9 A. Dr. Seed is a well-respected toxicologist in USEPA. I
10 worked with her a number of times. She's a developmental
11 toxicologist. Very astute.

12 Q. Dr. John Wheeler from the Agency for Toxic Substances
13 and Disease Registry?

14 A. I knew him a little bit less well. Probably not -- I
15 wouldn't have recognized him prior to that meeting.

16 Q. And he's got that same certification, DABT?

17 A. It's a Diplomate of the American Board of Toxicology.

18 Q. Is that board certification?

19 A. Board certification in toxicology, yes.

20 Q. Tell us about this organization. I think the jury heard
21 that term. I don't think we ever talked about that agency is,
22 what it does.

23 A. It's a U.S. federal agency located in Atlanta, Georgia.
24 They didn't exist -- I guess they came into existence about 20
25 years ago when the Superfund site work became more prominent in

1 the U.S. government. EPA, I believe at the time, was doing the
2 work and it was so extensive they created another agency. I'm
3 sure there's some political things about that but I'm unaware
4 of any of that. And they do have some really good scientists
5 down there. John Wheeler I got to know as a good scientist.
6 They also had some luminaries, Christa Rosa was another person
7 that came from EPA, went down there, did a lot of good work.

8 Q. These individuals from USEPA and the Agency for Toxic
9 Substances Disease Registry, were these knowledgeable and
10 competent people?

11 A. Oh, absolutely.

12 Q. Factually, sir, can you describe for us generally the
13 steps of the process that was followed by the CATT team to come
14 up with the drinking water screening level?

15 A. Well, yeah. In general what had happened was USEPA --
16 TERA staff summarize a large body of information into tables
17 with summaries and then that information was passed out to the
18 CATT team probably three, four weeks ahead of the meeting. The
19 CATT team then looked at the information. If they had
20 questions, they could come to TERA and say, hey, I want more
21 information on this study or whatever. And then we had the
22 meeting and at the meeting we carefully went through each study
23 trying to cull out about this study, where is the place where
24 the study doesn't show any effect.

25 Because what toxicologists do, they'll test experimental

1 animals in an ethical way and they want to test a high enough
2 dose to cause a toxicity. All chemicals are toxic, even water
3 if you drink too much will kill you. So you test high enough
4 to see where the toxicity is and you test low enough to see
5 where there's no effect.

6 Between that gap, you study that and in the CATT team
7 study, each study that way and try to determine the no-effect
8 level and then the effect level. Once you determine that, they
9 culled it out as a no observe adverse effect level and they
10 went through each study. Once they did that, they started
11 looking at different studies and applying this thing called a
12 safety factor or uncertainty factor to take that animal
13 no-effect level and project it to people. That becomes a safe
14 dose for people.

15 So the CATT team did that with each study and then at
16 the end, they went through and had a discussion about the
17 appropriate safety factors for each study because they're not
18 always the same.

19 Q. And was it an open discussion -- based on your personal
20 observations was it an open discussion among the various
21 people?

22 A. Open discussion and free flowing. One reason it's free
23 flowing is what we do in our particular situation and what was
24 followed here is that we don't say who said what in the notes
25 so there isn't a person assigned to a particular statement.

1 Even though during the meeting, of course, a person makes a
2 particular statement.

3 What that allows is anybody to make whatever comment
4 they want based on the science and that focusing on the science
5 is what we had in our meeting. It was a free-flowing
6 discussion.

7 Q. You mention the minutes. Could we bring page 10 back
8 up, please?

9 So this page of the report is titled the CATT
10 toxicologist meeting minutes. It starts at page 10. Could you
11 check your copy there, does that continue through page 35 of
12 the report?

13 A. That's correct.

14 Q. And is that detailed minutes of the various studies that
15 you looked at, some of the key points that were brought out
16 about the studies and the votes to conclusion?

17 A. That's correct.

18 Q. And with regard to that, reaching a conclusion, how did
19 that work? Was it one person/one vote or some other method?

20 A. The attempt is to do consensus. Unanimous consensus
21 would be ideal, of course. The studies are pretty complex and
22 for many of the studies we did have unanimous decisions on
23 where the no-effect level was and the effect level. The
24 uncertainty factors discussions were a little bit more less
25 unanimous. So in those cases what we did was we just voted.

1 Everybody was heard and then the chair, Dr. Staats would --

2 If someone said, hey, the safety factor should be 10,
3 which is sort of our default maximum and other people said,
4 well, I don't think that's a worry at all. I think it should
5 be 1, which is basically saying I don't think we should even
6 use it and other people would say, well, it should be halfway
7 between. Well, halfway between when you use safety factors,
8 you multiply them. Halfway between is not 5 which is what you
9 think normally. It's 3. Three times three is about ten. It's
10 probably a scientific technical point. But three is kind of
11 the midway point.

12 So people would say 1, 3 or 10 often. If there was a
13 spread, the chair would say can we all live with, let's say,
14 this number. Let's say 3. If you can live with it, that's
15 what they went with. But sometimes we voted and there was
16 different votes. That's all laid out in the document.

17 Q. Let's get to the results over at page 33. If you could
18 bring up the screening levels.

19 The report says the screening levels are calculated
20 following the premise that if lifetime exposure is equal to or
21 less than the pRfD or pRfC then no risk of deleterious effect
22 is expected. Is that right?

23 A. That's correct. According to the definition of RfD or
24 RfC.

25 Q. What are those describing?

1 A. The reference dose is the dose with uncertainty spanning
2 perhaps an order of magnitude kind of a tenfold. So it's kind
3 of imprecise. The daily, in the case of a reference, those
4 daily oral exposure or the case of an RfC inhalation,
5 continuous inhalation exposure, it's likely to be without
6 deleterious effects for a lifetime in sensitive subgroups. In
7 the general population including sensitive subgroups. So this
8 protects everybody. That's the intent.

9 Q. We can go to page 35. Blow up for water.

10 The determination was for water that that number was, is
11 that 150 parts per billion?

12 A. 150 micrograms per liter is parts per billion.

13 THE COURT: Is there an objection?

14 MR. DOUGLAS: Your Honor, I would request at this time
15 the limiting instruction with respect to this number.

16 THE COURT: I'll see you at side-bar.

17 You may stand if you wish, ladies and gentlemen.

18 - - -

19 Thereupon, the following proceeding was held at side-bar:

20 THE COURT: The defendants had a different proposed.
21 You want me to use the 2014 as the date of the science -- 2012,
22 excuse me.

23 MR. MACE: Yes.

24 THE COURT: Do you have an objection to that?

25 MR. DOUGLAS: I'm sorry, I'm not following that.

1 MR. MACE: Mentioning the date that the science panel
2 came out with the finding.

3 THE COURT: As 2012.

4 MR. BILOTT: We would ask that the Court read the
5 original instruction that was agreed to.

6 MR. DOUGLAS: I don't think it's a good idea to change
7 anything.

8 THE COURT: It's a long one. I've given it at least,
9 I'm going to guess, seven or eight times.

10 MR. DOUGLAS: But I think this is an important time to
11 give it and I would note that any time the word trial has been
12 mentioned, Mr. Mace pops out of his seat and requests that
13 charge.

14 THE COURT: I'm going to use, for now, the one that
15 was the previous one but I did ask, I think, Mr. O'Brien to
16 take a look at this and tell me what his view is. We'll
17 address that the next time.

18 MR. DOUGLAS: Thank you, Your Honor.

19 - - -

20 Thereupon, the following proceedings were had in open
21 court:

22 THE COURT: Counsel, let me see you again at side-bar.

23 Ladies and gentlemen, you may stand by your seats, if
24 you wish.

1

- - -

2

Thereupon, the following proceeding was held at side-bar:

3

4

5

THE COURT: This is not in the list that we put together. Are you talking about the instructions I gave at the beginning of the case?

6

MR. MACE: I think that is.

7

MR. DOUGLAS: And several times during the course.

8

THE COURT: Very good. I'll just stay with the script that we used at the beginning of the case. Thank you.

10

- - -

11

Thereupon, the following proceedings were had in open court:

13

THE COURT: So, ladies and gentlemen, I know you've heard this before but this is an important part of this case.

15

As you recall, the parties agreed before this case started that, based on the science panel, there was a level that if Mrs. Bartlett proves she's entitled to, that being that she drank the water for more than a year and that the water she drank contained a C-8 level of greater than .05 parts per billion then the issue of general causation would not be one for you to decide.

22

We're looking at a different standard here, earlier in time. And that's offered for you to consider when you look at DuPont's conduct but not with regard to the issue I just mentioned that the parties have agreed to.

1 So with that, you may continue.

2 MR. MACE: Thank you, Your Honor.

3 BY MR. MACE:

4 Q. Dr. Dourson, I think you mentioned that you could help
5 us understand part per billion maybe?

6 A. Right. So the way you look at part per billion is you
7 take a sugar packet, you open up and you dump it out and you
8 have all those little sugar granules. Of course they all weigh
9 different amounts. Generally they're 10 micrograms to
10 100 micrograms. So if you lick your finger and pick one up,
11 you get 10 micrograms. If you put that into a liter of water,
12 or three cans of Coke or something like that, that's 10 parts
13 per million. 10 micrograms per liter.

14 So 150 is more than that. It's two or three of them,
15 depending on how much they weigh.

16 Q. So before we leave the CATT report, let me just point
17 out a couple things. At page 46 there's a discussion on water
18 and there's the DEP -- DEP is the Department of Environmental
19 Protection?

20 A. I believe so, yeah.

21 Q. Notes the water screening level is higher than DuPont's
22 internal community exposure guidelines for drinking water of 1
23 or 3 parts per billion. However, these guidelines were
24 developed in the early '90s and based solely on two-week
25 inhalation study from '86. Since then, significant additional

1 toxicology data have been collected and the CATT water SL is
2 based on a comprehensive examination of all available
3 information.

4 Did you feel that the number that you came up with with
5 this CATT team was based on a comprehensive examination of all
6 available information?

7 MR. DOUGLAS: Objection. Calling for an expert
8 opinion.

9 THE COURT: We're getting right up to that.

10 This witness is here to talk about the methodology and
11 just the process by which this was done, not to give an expert
12 opinion on anything in conclusions like that.

13 With that distinction in mind, he may answer the
14 question.

15 BY MR. MACE:

16 Q. You may answer, Doctor. Did you feel that your process
17 involved a comprehensive examination?

18 A. Absolutely. The fact is, the usual process is one group
19 does -- looks at all the data by themselves and after they
20 write the report they get it peer reviewed by an outside group.
21 This was different in that we had an outside group come
22 together and collectively develop the risk value. It was
23 actually surprising that we got it done in two days. We've
24 never done that before. We've done it since because we've
25 taken this as a model to apply to other situations. So it was

1 a very good rendition of the data and a good discussion with
2 different viewpoints during the course of the two days.

3 Q. One other point. If we could go over to page 27. This
4 paragraph here on the cancer hazard. Talks about cancer hazard
5 identification.

6 The panel discussed the evidence for C-8 carcinogenicity
7 in humans and agreed that the human carcinogenicity evidence is
8 inconclusive. Although four prostate tumors were reported in
9 retired workers, three of these four cases now are known to
10 have minimal or no C-8 exposure.

11 As part of the studies that the CATT team discussed, did
12 you discuss the '93 Gilliland thesis about the 3M plant and the
13 prostate cancer?

14 A. I believe I did. I'd have to check to make sure.

15 Q. Could you check the report and look at it?

16 A. That was a human study section? That was Gilliland and
17 Mandel 1996? Gilliland and Mandel 1993. I see it.

18 Q. Did your team review both the '93 Gilliland and Mandel
19 and the '96 update?

20 A. Yes, we did.

21 Q. Doctor, did the toxicologists who participated in coming
22 up with the determination that the lifetime exposure to the 150
23 parts per billion or less of C-8 would have no risk of
24 deleterious effects, did those toxicologists sign a
25 certification of the final report?

1 A. Yes, they did.

2 MR. MACE: May I approach the deputy clerk, Your
3 Honor?

4 THE COURT: You may.

5 BY MR. MACE:

6 Q. Doctor, we've handed you what's been marked as D1812.
7 Do you recognize that?

8 A. Yes, I do.

9 Q. Are those copies of the signed certifications?

10 A. Yes, they are.

11 Q. Could you please bring up 1812? Let's start with page
12 dot 3. Mr. Hoepner, if you could bring up the language at the
13 top.

14 I apologize for the quality of this. Can you see the
15 words, I agree that the notes, as presented, accurately reflect
16 the panel's discussion and conclusions during the May 6 to
17 7, '02 C-8 assessment of toxicity toxicologists panel meeting.
18 You see that language?

19 A. Yes, sir.

20 Q. Down below, did Dr. Wheeler from ATSDR signed that?

21 A. Yes, he did.

22 Q. Go back to the cover page. Did Dr. Rotenberg from EPA
23 sign that?

24 A. Yes, he did.

25 Q. Go to page dot 4. Did Dr. Seed from EPA sign that?

1 A. Yes, she did.

2 Q. And over at dot 5 did Dr. Cicmanec sign it as well?

3 A. Yes, he did.

4 Q. Did you sign it as well?

5 A. Yes, I did.

6 Q. Did all ten of the toxicologists sign it, sir?

7 A. We all signed it.

8 Q. And back at that time, sir, after the final report had
9 been issued, what was your feeling about the process that had
10 been used to come up with that number?

11 A. Again, I --

12 MR. DOUGLAS: Objection.

13 THE COURT: I think it's the framing of the question.
14 Rephrase that, please. Feeling is the word that set
15 Mr. Douglas on his feet.

16 BY MR. MACE:

17 Q. Sir, that process, did you feel that that was a fair and
18 reliable process that had been used to come up with that
19 number?

20 MR. DOUGLAS: Same objection. It's word. It's an
21 expert opinion.

22 THE COURT: Overruled. It's a question about process.
23 The objection is overruled. You may answer.

24 THE WITNESS: I thought the process was great. And,
25 again, we've used it subsequently to do complex evaluation.

1 BY MR. MACE:

2 Q. Sir, let me switch topics a second. Are you familiar
3 with the term conflict of interest?

4 A. Yes, I am.

5 Q. What does that refer to?

6 A. Well, there's a couple ways you could look at it. We
7 have a well-established -- we have a conflict of interest
8 statement on our website for all peer reviews and work that we
9 do. Conflict of interest can look to be a financial conflict
10 of interest. So it's not like it's wrong but if I own stock in
11 DuPont, for example, and I would go into this meeting, I would
12 have a financial conflict of interest. That's a financial
13 conflict of interest.

14 There are times when a conflict of interest might be --
15 well, let's go to the bias. Then they have biases. And the
16 way scientists look at biases is we're all biased. I'm a
17 toxicologist so I look at epidemiology data from a toxicology
18 perspective. I have a toxicology bias.

19 So you balance biases on peer review panels but you
20 avoid conflicts of interest. On occasion, someone has such
21 intense biases, that's a conflict. And that's a judgment call.
22 We go through that with each of our panels.

23 Q. Sir, did you have a conflict of interest in working on
24 the CATT team?

25 A. No. Not at all. I didn't have a financial conflict of

1 interest for the reasons that we described on our website.

2 Q. Did anybody at TERA? You had some other members of your
3 team that were on that group. Did anybody at TERA have a
4 conflict of interest working on the CATT team?

5 A. No. They didn't have a financial conflict of interest.

6 Q. A separate issue, Dr. Dourson. If anybody suggested to
7 the jury that TERA was biased toward industry, is that
8 accurate?

9 A. Well, I wouldn't use the word biased toward industry.
10 Our mission is to protect public health and we do this by
11 looking at the science as best possible. Our motto is
12 dedicated to the best use of tox data for risk values. That's
13 what we're all about. We build collaborative information so we
14 work with industry and government and NGOs, nongovernment
15 organizations, to build teams to do this. When you're building
16 a team you can't be overtly or even partially biased with one
17 part of the team or other. You have to just be neutral. We're
18 really -- we strive to be neutral in all cases.

19 If someone said that, I would encourage them to look at
20 our website. You can look at the funding, you can look at the
21 types of work we've done. You can look at, I don't want to say
22 accolades. That's probably too strong. There have been people
23 that have talked about us. For instance, the EPA Inspector
24 General wrote a report on peer reviews --

25 MR. DOUGLAS: Your Honor, I'm going to ask that that

1 be stricken.

2 THE COURT: The objection is sustained.

3 BY MR. MACE:

4 Q. Back in 2002, so let's focus on the year in question.

5 A. Sure.

6 Q. Back in 2002. Was TERA biased toward industry back in
7 2002?

8 A. No.

9 Q. You mentioned funding.

10 MR. MACE: May I approach, Your Honor?

11 THE COURT: You may.

12 BY MR. MACE:

13 Q. Have you been handed a demonstrative aid which is a
14 printout from your website of funding from over the years?

15 A. Yes.

16 Q. Bring that up, please. And if we could bring up the
17 table at the bottom.

18 What is this graphic showing in terms of just overall
19 before we focus on 2002?

20 A. Just overall it's just the amount work we do for
21 government other than nonprofit versus industry and industry
22 related.

23 Q. So in 2002, which was the year of this CATT team report,
24 how did the breakout work?

25 A. Well, yeah. 72 percent was government or other

1 nonprofit work and 28 percent was industry or industry related.

2 Q. And that number has varied at different times in
3 different years?

4 A. Oh, yeah. Roughly it's about two-thirds government,
5 one-third industry, roughly.

6 Q. Sir, were you personally present during these CATT team
7 meetings, both days, on May 6 and May 7 of 2002?

8 A. Yes.

9 Q. Did you personally observe what went on in the meetings?

10 A. Yes.

11 Q. The jury has seen Mr. Kennedy from Mr. DuPont was part
12 of the meeting?

13 A. Yes, he was.

14 Q. Based on your personal observations, was Mr. Kennedy
15 dominating the discussion?

16 A. No.

17 Q. Did you hear Mr. Kennedy try to strong-arm anyone into
18 voting a certain way?

19 A. No.

20 Q. We saw up on the list that Dr. Butenhoff from 3M was
21 also there as an invited guest?

22 A. Yes.

23 Q. Since 3M had conducted a number of the animal studies
24 and was the manufacturer and supplier of C-8 was it helpful to
25 have him there to answer questions anyone would have?

1 A. Yes. Study directors are always useful at meetings like
2 this.

3 Q. During your personal observations during those two days
4 of the meetings, did any of the industry representatives
5 dominate the discussions or the voting?

6 A. No.

7 Q. Were the industry folks lobbying for higher numbers for
8 the screening level?

9 A. No.

10 Q. Bottom line, Dr. Dourson, did it appear to you that the
11 CATT team process was an unbiased process with an open
12 discussion of the science based on the knowledge at the time?

13 A. Absolutely.

14 Q. Sir, did anyone coerce you or improperly influence you
15 in any way to arrive at 150 part per billion number?

16 A. No.

17 Q. Before I sit down, sir, have you ever testified for me
18 before?

19 A. No.

20 Q. Have you ever testified for anyone from my law firm,
21 Squire Sanders or Squire Patton Boggs before?

22 A. No.

23 Q. Have you ever been employed by DuPont?

24 A. No.

25 Q. Do you own any stock in DuPont?

1 A. No.

2 Q. Did you receive a subpoena to be here to testify today?

3 A. Yes, I did.

4 Q. Was that served on your at your office at the University
5 of Cincinnati?

6 A. Yes, it was.

7 Q. Other than reimbursement of your mileage expenses for
8 traveling here to testify and your daily subpoena attendance
9 fee of \$40 are you receiving any money from DuPont?

10 A. From DuPont, no.

11 Q. Did I talk to you by phone to check on some facts a
12 couple of times over the past few months?

13 A. Yes, you did.

14 Q. Did you ever meet me before you walked into the
15 courtroom today?

16 A. No, I haven't.

17 MR. MACE: Thank you, sir. I have nothing further at
18 this time.

19 THE COURT: Thank you, Mr. Mace.

20 Mr. Douglas, you may cross-examine.

21 - - -

22 CROSS-EXAMINATION

23 BY MR. DOUGLAS:

24 Q. Good morning.

25 A. Top of the day to you.

1 Q. Not accustomed to hearing somebody say top of the day.
2 I haven't been in England for quite a while. I guess it's an
3 acceptable way of saying good morning.

4 A. It certainly is.

5 Q. And a good morning to you, sir.

6 Did I hear you say you received a subpoena to be here
7 today?

8 A. Yes, I did.

9 Q. You don't mean to imply to our jurors that but for the
10 subpoena you wouldn't be here?

11 A. I'm not sure how to answer the question.

12 Q. Let me see if I can help you out. When did you receive
13 the subpoena?

14 A. Yesterday.

15 Q. Where were you when you received it?

16 A. At the University of Cincinnati.

17 Q. What time of day did you receive it?

18 A. I think it was the afternoon.

19 Q. How long have you been in Columbus?

20 A. You mean this morning?

21 Q. When did you get to Columbus, Ohio?

22 A. I came in about -- left Cincinnati at 5:30. 7:30
23 roughly.

24 Q. You did not arrive yesterday?

25 A. No, sir.

1 Q. And so but before you received the subpoena you knew
2 that you were going to be here today and testify, correct?

3 A. Yes, I had been --

4 Q. When did you first know, sir, that you were going to
5 travel from Cincinnati to Columbus, Ohio to give testimony for
6 the defendant DuPont in this case?

7 A. Probably last week.

8 Q. That's the first time you ever heard that your testimony
9 would be wanted in this case, in this trial?

10 A. No. Pardon me. I thought I answered your question
11 directly. Maybe I misunderstood it. What was the question?

12 Q. When were you first asked to give testimony in this
13 case?

14 A. I was -- probably several months ago when -- well, I'm
15 not so sure. Several months ago Mr. Mace had questions.

16 Q. And you had spoken to Mr. Mace before today. This isn't
17 the first time you've spoken with him?

18 A. Oh, no. I've spoken with Mr. Mace. He had questions
19 about part of the files that we kept.

20 Q. Was that by telephone?

21 A. Yes.

22 Q. Have you ever met Mr. Mace before?

23 A. No.

24 Q. Have you met anybody from his firm before?

25 A. I don't believe so.

1 Q. What do you mean you don't believe so?

2 A. I don't know everybody in his firm.

3 Q. You didn't mean to suggest to our jurors that you just
4 found out yesterday, you got a subpoena and you got in your car
5 and came here all bright-eyed and bushy-tailed, ready to go to
6 give testimony that you had no idea of -- no way of knowing
7 that you were going to --

8 A. I don't mean to imply that.

9 Q. By the way, you know that -- my name, by the way, is
10 Mr. Douglas. Gary Douglas.

11 A. Nice to meet you.

12 Q. Good to make your acquaintance. You know that folks,
13 paralegals and attorneys from my team, have tried to call you
14 and ask you questions about your files.

15 A. Okay.

16 Q. And you know a Ms. Carol Moore? She's a paralegal.

17 A. Good morning.

18 Q. Why don't you tell the jurors, do you check your
19 messages, sir?

20 A. Check my messages?

21 Q. Yeah. When people leave a message and they call?

22 A. Absolutely.

23 Q. Then you know that Ms. Moore has been calling you
24 several times and you have yet once to return her call. Do you
25 know that?

1 A. I'm not aware of that, sir.

2 Q. You're not aware of that. I thought you checked your
3 messages?

4 A. As I said, I'm not aware of any message from Ms. Moore.

5 Q. So would you be willing to talk to us privately, as you
6 spoke to Mr. Mace?

7 A. Absolutely.

8 Q. Then why didn't you return her calls?

9 A. Sir, I don't know -- I'm not aware of any calls from
10 Mrs. Moore.

11 Q. So when you leave today would you mind talking with me?

12 A. No. No problem at all.

13 Q. Sir, what is your salary?

14 A. At the University?

15 Q. Let's start with TERA.

16 THE COURT: I'll see you at side-bar, counsel.

17 You may stand by your seats, ladies and gentlemen.

18 - - -

19 Thereupon, the following proceeding was held at side-bar:

20 THE COURT: What's this? I mean, he's connected to
21 TERA.

22 MR. DOUGLAS: He's representing that he works for this
23 nonprofit company, that's looking out for the public health
24 which is -- I'm trying to expose that as being just a facade.

25 THE COURT: Did you watch the woman from Planned

1 Parenthood testify before Congress that she made 500,000 a
2 year? You can tell. If this is somebody who was an expert,
3 the fees are always in play. But he's not being paid by
4 DuPont. So what difference does the salary make?

5 MR. DOUGLAS: Because Mr. Mace didn't get into
6 betraying the MSS person who is so concerned about the public
7 health I wouldn't get into it.

8 THE COURT: I'm assuming the head of the Sierra Club
9 makes a lot of money too. What inference would the jury draw
10 from his salary?

11 MR. DOUGLAS: That he's not as altruistic as he's
12 painted to be.

13 THE COURT: I just don't see it. There are people who
14 had nonprofits who are not connected to anything to do with
15 industry that make a lot of money. It's not probative.

16 MR. DOUGLAS: Okay. I'll move on.

17 - - -

18 Thereupon, the following proceedings were had in open
19 court:

20 THE COURT: Mr. Douglas, you may continue.

21 MR. DOUGLAS: Thank you, Your Honor.

22 BY MR. DOUGLAS:

23 Q. Writing down some notes?

24 A. Yes.

25 Q. Does it have to do with your testimony?

1 A. Yes. I wrote down your name so I'd remember it,
2 Mr. Douglas.

3 Q. Sir, I just want to get this straight. You were hired,
4 you say, by the West Virginia Department of Environmental
5 Protection, correct?

6 A. I think --

7 Q. Your company was?

8 A. I think it was a contractor to West Virginia that
9 approached us.

10 Q. Who was that?

11 A. I don't recall off the top of my head.

12 Q. What kind of contractor?

13 A. A contractor that works for the State of West Virginia.

14 Q. What do they do?

15 A. I don't know.

16 Q. So you get contacted by this contractor and you put
17 together, if I understand correctly, a summary of the studies
18 that you had been provided with from DuPont, right?

19 A. Well, there was two tasks. The first task was for the
20 TERA staff to put together a summary of information on this
21 particular chemical which included available information on
22 literature search.

23 Q. So the summary -- and then the summaries were put
24 together by TERA, your company, right?

25 A. Right. What we did then is we summarized --

1 Q. Just yes or no is fine.

2 A. Yes.

3 Q. Then you took the summaries and you gave them to the
4 members of the CATT team?

5 A. The summaries and associated references were given to
6 the CATT team, yes.

7 Q. And then a few weeks passed by and you have this
8 meeting, right?

9 A. Yes.

10 Q. And this meeting lasted a grand total of two days,
11 correct?

12 A. That's correct.

13 Q. And by the end of those two days the CATT team comes up
14 with this number of 150 parts per billion which is 150 times
15 higher than the level which had been set at that time by
16 DuPont, right?

17 A. I'm not aware of what DuPont had set at that time so I'm
18 not sure how to answer your question, sir.

19 Q. I'll rephrase it for you.

20 A. Okay. Thank you.

21 Q. So in this two-day meeting where you're discussing all
22 of this -- all the summaries and all the scientific literature,
23 whatever it was you were doing, grand total of two days you
24 came up with this 150 parts per billion number, right?

25 A. Well, that forgets the prior three or four weeks the

1 team was studying it.

2 Q. So in a matter of three or four weeks and two days --

3 MR. MACE: Your Honor, I object to the interrupting of
4 the witness.

5 THE COURT: Read back the second to last question from
6 Mr. Douglas and we'll let the witness answer.

7 (Thereupon, the last question was read by the court
8 reporter.)

9 THE COURT: And your answer?

10 THE WITNESS: No.

11 BY MR. DOUGLAS:

12 Q. It was a grand total of three or four weeks plus these
13 two days?

14 A. Yes.

15 Q. From the time you were contacted by this contractor,
16 whose name you can't recall, and the time that the CATT team
17 came up with this 150 parts per billion?

18 A. Yes.

19 Q. Now, did I hear you say you didn't know at the time that
20 you did this allegedly comprehensive review that DuPont had
21 already set a level of 1 part per billion? Did I hear that
22 correctly?

23 A. I wasn't sure that I knew that.

24 Q. Are you sure today?

25 A. No.

1 Q. Did Mr. Mace when he spoke to you remind you of that
2 fact?

3 A. He mentioned that fact. I don't think he --

4 Q. So he mentioned the fact but you forgot about it today?

5 A. At the time --

6 Q. Which --

7 A. At the time of the meeting I don't remember being aware
8 of that fact.

9 Q. So you wouldn't be aware of, if you were not aware of
10 that fact, that DuPont had already set a level of 1 part per
11 billion for water, you certainly weren't aware of how they
12 derived that number, correct?

13 A. That's correct.

14 Q. And would it be fair to say that at that point in time
15 the folks at DuPont, the time you assembled your CATT team and
16 in this three or four weeks came up with this 150 part per
17 billion number, would it be fair to say that when you were
18 first contacted by this contractor, whose name you can't
19 recall, that DuPont would have known a lot more about C-8 than
20 you, right?

21 A. Before we were contacted, I would presume so, yes.

22 Q. You knew nothing about C-8 at that point in time,
23 correct?

24 A. I wouldn't say that.

25 Q. Since you guys brought it up on the direct examination

1 about whether your company, TERA, is biased, you know the old
2 Shakespeare saying, he doth protest too much? You familiar
3 with that saying?

4 A. Unfortunately, no.

5 Q. Didn't read much Shakespeare?

6 A. Wasn't my strong suit.

7 Q. I didn't do too well in that class either.

8 So since you guys brought it up, I have a few questions
9 about it.

10 A. Absolutely. Please do.

11 Q. Let's start with how your company was approached. You
12 don't -- you didn't know that you were handpicked by DuPont to
13 do this work?

14 MR. MACE: Objection, Your Honor. Assumes facts.

15 THE COURT: Unless there's a foundation for that
16 question, the objection is sustained.

17 BY MR. DOUGLAS:

18 Q. Did you know, sir, that you were handpicked by DuPont to
19 do this work?

20 A. No.

21 Q. And speaking of bias, you have been accused, on many,
22 many occasion, of being industry biased. Biased in favor of
23 industry. Many media reports, investigative reports by
24 investigative journalists and in consumer interest groups,
25 correct?

1 MR. MACE: Objection, Your Honor.

2 THE COURT: It has to come from the witness, not the
3 attorneys. Keep in mind questions are not evidence. It's the
4 answers from witnesses that are the only evidence you can
5 consider.

6 You may seek your answer.

7 You may answer.

8 THE WITNESS: Okay. Thank you.

9 I guess I'm going to have to say no to that because of
10 the way you phrased it.

11 BY MR. DOUGLAS:

12 Q. So you have been the subject of news reports,
13 investigative news reports where you've been accused of having
14 an industry bias. Yes or no?

15 A. Yes.

16 Q. And you've been quoted in a number of these
17 investigative news reports denying wholeheartedly that you are
18 biased in favor of industry, correct?

19 A. I'm hung up on your word numerous.

20 Q. More than one?

21 A. More than one, yes.

22 Q. How many times?

23 A. I'm aware of maybe three. Independently -- well, three
24 reports.

25 Q. One of them dubbed you the industry favorite, right?

1 A. I don't --

2 Q. You were quoted extensively -- weren't you quoted
3 extensively in an article in which you were referred to as a
4 favorite of industry. A Pulitzer-Prize-winning news
5 journalist. Does that refresh your recollection?

6 A. No, it does not.

7 Q. Why don't we --

8 A. That would be helpful if you pull it up.

9 MR. MACE: Could we approach, Your Honor?

10 THE COURT: I'll see you at side-bar.

11 You may stand if you wish, ladies and gentlemen.

12 - - -

13 Thereupon, the following proceeding was held at side-bar:

14 THE COURT: Do we have the article? And you'd like
15 to -- you would cross him with his own statements?

16 MR. DOUGLAS: Well, and the matters that he responded
17 to.

18 MR. MACE: But it's pretty extraneous, Your Honor, in
19 using the hearsay statements from some media source. It's one
20 thing to ask him about his statements without displaying the
21 document. I don't think he should be allowed to display the
22 document that has hearsay statements by media with nobody I can
23 cross. He wants to bring the reporter in --

24 THE COURT: I'm with you. His statements in here are
25 certainly fair game. And if he can -- I'm sure he's seen the

1 article but that doesn't necessarily make it admissible.

2 MR. DOUGLAS: May I lay the foundation?

3 THE COURT: You can try.

4 MR. MACE: You're not going to allow him to display
5 it.

6 THE COURT: Don't display it.

7 MR. DOUGLAS: It will not be displayed.

8 - - -

9 Thereupon, the following proceedings were had in open
10 court:

11 MR. DOUGLAS: May I approach, Your Honor?

12 THE COURT: You may.

13 BY MR. DOUGLAS:

14 Q. Do you recognize the article?

15 A. Yes, I do.

16 Q. It's entitled *One-stop science shop has become a*
17 *favorite of industry-and Texas.* Is that the article?

18 A. Yes, it is.

19 Q. And you're quoted extensively in this article, correct?

20 A. I'm quoted in the article, correct.

21 Q. And this was in the Pulitzer-Prize-winning news
22 organization Inside Climate News, right?

23 A. I don't --

24 Q. You don't recall?

25 A. I don't know that.

1 Q. In this article you deny -- you are quoted extensively
2 denying accusations that you are an industry favorite, the
3 go-to guy, the guy who sets these limits really, really high so
4 that industry can just slide right through, right?

5 A. Would you like to point to a particular piece, sir?

6 Q. Absolutely.

7 A. Thank you so much.

8 Q. Do you deny the accusation, second page, one, two,
9 three. You're quoted. You see where you're quoted in the
10 third paragraph?

11 THE COURT: You've seen this article, you're familiar
12 with it?

13 THE WITNESS: Yes, sir.

14 THE COURT: Go ahead.

15 BY MR. DOUGLAS:

16 Q. You're quoted on that page, right?

17 A. Line three?

18 Q. Line three.

19 A. Of page two?

20 Q. On page two.

21 A. Right. Absolutely.

22 Q. Below that, and you're responding to an accusation in an
23 investigation by the Center for Public Integrity and Inside
24 Climate News shows your firm has close ties to chemical
25 manufacturers, tobacco companies and other industries. You

1 were quoted responding to that accusation and that
2 investigation by the Center for Public Integrity, right?

3 A. That's not correct. I wasn't --

4 Q. Do you see the words --

5 THE COURT: Wait. You interrupted.

6 Go ahead. Finish your answer.

7 THE WITNESS: I wasn't responding to accusations. I
8 was just being interviewed by a reporter and answering the
9 questions posed by the reporter.

10 BY MR. DOUGLAS:

11 Q. And the questions had to do -- you were asked about an
12 investigation by the Center for Public Integrity which found
13 that your company had close ties to chemical industry, tobacco
14 industry and other industries, right?

15 A. Well, again, sir, you're asking a question about facts
16 not in evidence. I wasn't --

17 Q. Are you a lawyer, sir?

18 THE COURT: Let's not get into that. That's beyond
19 what this witness can say.

20 Ask the next question.

21 BY MR. DOUGLAS:

22 Q. The subject matter of your interview was this
23 investigation of your company by the Center for Public
24 Integrity. It's right there. Take a look.

25 A. That's not correct.

1 Q. You see on the paper where it says, an investigation by
2 the Center for Public Integrity. You see where I'm reading
3 from, sir?

4 A. I see that. That's what the --

5 Q. You see where it says, shows the firm has ties to
6 chemical --

7 MR. MACE: Object to the cutting off of the witness.

8 THE COURT: He didn't finish the answer.

9 THE WITNESS: Sir, this is written by a reporter. I
10 interviewed with the reporter prior to this. I interviewed
11 with a reporter who asked me questions about TERA. It wasn't
12 in response to anything in particular. And I got this
13 afterwards. And the words that you say are correct but I
14 wasn't responding to anything along these lines. I was just
15 answering questions of the reporter.

16 BY MR. DOUGLAS:

17 Q. But you know that there was an investigation of your
18 company by the Center for Public Integrity in regard to your
19 close ties to the chemical industry, tobacco industry and other
20 industries. You're aware of that?

21 A. There was a report prior to this thing.

22 Q. And there's a report after this thing.

23 A. Is there? Okay. Thank you.

24 Q. Not surprised to hear that?

25 A. Surprised to hear what?

1 Q. That there would be other reports of your close ties to
2 the chemical industry?

3 A. You're surprised to hear that?

4 Q. Are you surprised, sir?

5 A. Yes, actually I am.

6 Q. If you go to the next page, I want to ask you about --

7 A. Sure.

8 Q. -- something else in this article about your company
9 and you.

10 A. Okay. Page 3.

11 Q. 3 of 9.

12 A. I've got 3 of 12.

13 Q. Are you familiar with the term, quote, whitewashing the
14 work of industry, end quote? Are you familiar with that
15 phrase?

16 A. No.

17 Q. Your firm has been accused of whitewashing the work of
18 industry, hasn't it?

19 A. If you say so. Are you saying --

20 Q. That's what you did in your work coming up in this
21 three-week magical period of coming up with this 150 parts per
22 billion. You whitewashed DuPont's C-8 problem, yes or no? And
23 if you can't answer it yes or no, I'll come up with another
24 question.

25 A. No. Affirmatively no.

1 Q. In fact, you defended, in this interview, your decision
2 to work with the tobacco industry, right? Which is fine. It's
3 your prerogative. Do you recall defending that?

4 A. I made a comment about a hypothetical.

5 Q. And you said in response to -- in defending your
6 decision to work with the tobacco industry you said, quote,
7 Jesus hung out with prostitutes and tax collectors. He had
8 dinner with them, end quote, to justify your work with the
9 tobacco industry. Were those your words, sir?

10 A. The premise of your question is incorrect. Those are my
11 words. I like to get Jesus quotes in as often as I can.

12 Q. In terms of hanging out with prostitutes, are you
13 analogizing DuPont with the tobacco industry, the companies you
14 work with to prostitutes and tax collectors?

15 THE COURT: I don't think DuPont is in this article,
16 so strike that part of the question.

17 THE WITNESS: It was a hypothetical response given to
18 a reporter's question. The reporter put ties together with
19 tobacco industry that they surmised.

20 BY MR. DOUGLAS:

21 Q. And in response you said, in defending your decision to
22 work with tobacco industry, you worked with tobacco industry,
23 correct?

24 A. We have taken \$85 from Reynolds Tobacco to Xerox some
25 paper for them when they had an issue with chromium when we

1 were doing work for USEPA. We charged them for it. I had a
2 colleague in Philip Morris back in the whatever, back in the
3 late '90s that had a problem with this benchmark dose. It's a
4 model that we can do real well and other people are just
5 learning now and we did that benchmark dose for him and we
6 charged him \$550. That's our tobacco money intake.

7 Q. We'll talk about some more of your tobacco money and
8 other industry money.

9 A. Okay. That would be great.

10 Q. But for you, your 550 bucks that you alleged is all you
11 got, that's like Jesus hanging out with prostitutes and tax
12 collectors. That's the quote.

13 A. The reporter put two different disparate ideas together
14 in that quote.

15 Q. So you say it's taken out of context?

16 A. I don't know what to say.

17 Q. I didn't think so.

18 A. Yeah.

19 Q. And you said in that article entitled favorite of
20 industry, we get criticized by everyone. That's true, right?

21 A. There have been times where we've been criticized by
22 everyone. That's true.

23 Q. Sir, I want to show you P3232 in regard to my questions
24 before about how you became the one that was selected to do
25 this work that took two or three weeks or three or four weeks.

1 I want to show you a document from DuPont, an e-mail P1.3232.

2 MR. DOUGLAS: May I approach, Your Honor?

3 THE COURT: You may.

4 BY MR. DOUGLAS:

5 Q. Do you know Timothy Bingman?

6 A. I don't think so.

7 Q. You see here we have an e-mail from Timothy Bingman
8 August 21st, 2000 to Robert Rickard. Do you know Robert
9 Rickard? Bobby Rickard as he's referred to?

10 A. I think I do know him.

11 Q. He's sitting right here, right?

12 A. Yes, I do.

13 Q. How do you know him? How do you know him?

14 A. Society of Toxicology meetings. Probably in the last
15 four or five years I've gotten to know him from that.

16 Q. You don't know him -- you didn't know him prior to four
17 or five years ago, sir?

18 A. I don't think so. I apologize.

19 Q. I'm sorry?

20 A. I apologize to Mr. Rickard.

21 Q. You see where it says prospective contractors for PFOA
22 criteria review. See that?

23 A. Sure.

24 Q. And you see where it says Bobby/Jerry. When you see
25 Dr. Rickard, do you call him Bobby? Are you on first-name

1 basis?

2 A. I wouldn't do that, Mr. Douglas.

3 Q. So you haven't. So when you see him at the toxicology
4 meetings, or whatever organization you've seen him, you call
5 him Dr. Rickard?

6 A. Well, usually it's Society of Toxicology meetings it is
7 a first-name basis. If I don't know the person well, and I
8 don't know if it's a doctor or not, I'll go with either first
9 name or mister or miss.

10 Q. So you see it says as a follow-up to the go-do I had
11 from this morning's meeting I've talked to a number of
12 colleagues that use external toxicity peer review services to
13 see who they like as contractors. You see that?

14 A. Yes, I do.

15 Q. You do toxicity peer review, right?

16 A. Yes, we do.

17 Q. That's what we're talking about here in terms of the
18 work you did with the CATT team, right?

19 A. That was actually more risk assessment development but
20 we also do reviews.

21 Q. And it says, one person from another chemical company
22 that used to work on the EPA's criteria office in Cincinnati
23 said that -- let's go back. Sorry.

24 While everyone had a few names to offer, talking about a
25 potential outside contractor, right?

1 A. Yes.

2 Q. The common theme that emerged was that TERA, i.e. Mike
3 Dourson. Is it Dourson or Dourson?

4 A. Dourson is okay.

5 Q. The common theme that emerged -- let's underline common
6 theme -- that emerged was that TERA, Mike Dourson, was the
7 leading choice. You see that?

8 A. Yes.

9 Q. And so it goes on to say, one person from another
10 chemical company -- you see where I'm reading from?

11 A. Yes.

12 Q. So this is folks from chemical companies talking about
13 who's the go-to guy, who's good to use, what company should we
14 hire, right? Is that apparent from what I just read?

15 A. I haven't read it all yet.

16 Q. One person from another chemical company that used to
17 work in the EPA's criteria office in Cincinnati said that Mike
18 enjoys a very good reputation among the folks that are still in
19 the business of blessing criteria.

20 Can we underline blessing criteria?

21 That's sort of like that whitewashing term, right?

22 A. I wouldn't say that, but okay. You do. Go ahead.

23 Q. You've heard the term blessing criteria, right?

24 A. Actually I haven't.

25 Q. It goes on to say, other added benefits besides the

1 blessing criteria -- you know what the word blessing means,
2 right?

3 A. Yeah. I think so.

4 Q. Okay. You know, Jesus blessed people, right?

5 A. Right.

6 Q. And it goes on to say, other added benefits that were
7 identified for TERA were their ability to put together an
8 independent peer review panel to oversee their findings; and,
9 two, their ability to assemble, a, quote, package, and then
10 sell this to EPA or whomever we desired.

11 See where I'm reading from?

12 A. Yeah.

13 Q. You sell things to the EPA, is that what you do?

14 A. No.

15 Q. So they got it wrong here when they were under the
16 impression that one of the reasons you should be hired is
17 because you're able to sell packages to the EPA. They got it
18 wrong, you don't sell stuff?

19 A. Toxicology Excellence for Risk Assessment doesn't
20 advocate for any position. We just do the science. So they
21 got it wrong. You're correct.

22 Q. In the same way, sir --

23 MR. DOUGLAS: May I, Your Honor?

24 THE COURT: Yes.

25

1 BY MR. DOUGLAS:

2 Q. You heard the Judge instruct the jury about this finding
3 of the science panel of .05 parts per billion being capable of
4 causing cancer, sir. So they got this wrong in the same way
5 that you got it wrong. Your great company, full of all this
6 integrity not only got it wrong, you got it wrong by 3,000
7 times higher than this .05 parts per billion. Not even close.

8 A. What's this scientific -- what's this science based on?

9 Q. I ask the questions, sir. Do you have an answer for me?
10 If you can't answer the question, I'll ask you another one.

11 A. What's the question, please?

12 Q. You got it wrong, sir. This number you came up with in
13 three or four weeks following this discussion with Dr. Rickard
14 about blessing criteria, your number of 150 parts per billion,
15 would you agree, mathematically speaking, is 3,000 times higher
16 than this number here, .05 parts per billion?

17 MR. MACE: Objection. Compound. Assumes facts.

18 THE COURT: Let me see you at side-bar.

19 You may stand by your seats, ladies and gentlemen.

20 - - -

21 Thereupon, the following proceeding was held at side-bar:

22 MR. MACE: The objection is that his question is
23 compound. It assumes facts. I also strongly object to the
24 crudity that he's showing to the witness. And particularly
25 with respect to the compound that he had assumed the fact that

1 he had a discussion with Rickard. He never saw the e-mail
2 before. It's an e-mail, not a discussion. It's misphrased.

3 MR. DOUGLAS: I can rephrase it.

4 THE COURT: That e-mail is coming in, I'm sure. But
5 this witness never did say he ever saw it before. We're past
6 that.

7 MR. DOUGLAS: I have no further questions on the
8 e-mail.

9 THE COURT: I want to be clear. I don't like to harp
10 about this but there's sometimes I will weigh in but I'm not
11 going to cover everything that's objectionable. That's what
12 the lawyers have to do on both sides. Sometimes it's
13 frustrating where I sit. But I'm supposed to be neutral.

14 MR. DOUGLAS: Sometimes we can get the sense from the
15 Court that maybe counsel should stand up and object.

16 THE COURT: That issue is number one. But here's the
17 bigger concern I have. Bias is always fair game. No argument
18 there. But the more we get into the findings and the science,
19 the more he's being crossed as if he's an expert.

20 MR. DOUGLAS: Well, he's been called here to testify
21 that this was the best science available, this 150 --

22 THE COURT: I get that. And the process up to this
23 point has gotten into how he was picked, how it was conducted,
24 that sort of thing. That's exactly what you're allowed to do.
25 But the more we get into him versus the science panel we're

1 going to be talking about his expertise and then we're going to
2 get into opinions is my fear. So I would caution you on that.

3 MR. MACE: And to correct his statement that the
4 direct was on best science available at the time when he did
5 the work in 2002. He was here for a very limited purpose.
6 He's way beyond the scope of direct.

7 MR. DOUGLAS: I'll address that. The whole point is
8 this was not the best science. This was junk science. I
9 should be free -- and it wasn't reasonable. Therefore, for a
10 company to believe the industry should --

11 THE COURT: That's what the jury is going to have to
12 decide. But at this point there's nothing pending right now.
13 We're going to take a 15 minute break and you can start again.

14 - - -

15 Thereupon, the following proceedings were had in open
16 court:

17 THE COURT: We are right up to our 15-minute morning
18 recess. We'll see you back in 15 minutes, ladies and
19 gentlemen.

20 (A recess was taken at 10:30 a.m. until 10:47 a.m.)

21 THE COURT: Mr. Douglas, you may continue.

22 MR. DOUGLAS: Thank you, Your Honor.

23 BY MR. DOUGLAS:

24 Q. You discussed that your firm TERA has a website, right?

25 A. We have several, yes.

1 Q. And it's had a website or several websites for years?

2 A. Yes.

3 Q. Take a look, since this came up during your questioning
4 on direct examination by Mr. Mace, I want to take a look at
5 some of that.

6 Can we have the 2012?

7 MR. DOUGLAS: May I approach?

8 THE COURT: You may.

9 BY MR. DOUGLAS:

10 Q. Before we get to it, you recall you were asked some
11 questions on direct examination about the source of funding for
12 your company by Mr. Mace. He produced a table that's from your
13 website, right?

14 A. That's correct, yes.

15 Q. This is also -- what I've handed you is from your
16 website?

17 A. Yes.

18 Q. I want to put it up on the Elmo. You see it's a 2012
19 project time by sponsor. You see where it says that?

20 A. Yes.

21 Q. So, first of all, it says, 2012 and it's 40 percent for
22 profit. You see that?

23 A. Yes.

24 Q. So we had, first of all, we had Dr. Siegel from the
25 Boston University School of Public Health here testified. If

1 somebody had suggested to him that your source of funding from
2 industry was only 1 percent, that would be completely and
3 utterly inaccurate, right?

4 A. I'm sorry, the question again?

5 Q. If somebody were to infer to our jurors that TERA
6 receives only 1 percent of its funding source from industry,
7 that would be misleading?

8 A. That's misleading.

9 Q. So some of your clients are Drinker, Biddle & Wreath.
10 You see that?

11 A. Yes.

12 Q. They're a law firm, right?

13 A. Could be.

14 Q. They are a law firm. Will you take my representation --

15 A. Sure.

16 Q. -- of that fact?

17 And they're a law firm, sir, that defends chemical
18 companies and pharmaceutical companies in lawsuits just like
19 this. Did you know that? It's on your website.

20 A. Do I recall that? I don't recall that off the top of my
21 head.

22 Q. You know what Amgen is, right?

23 A. I think it's a company that does pharmaceuticals.

24 Q. That's one of the sources of your funding is Amgen, a
25 pharmaceutical company?

1 A. That's correct.

2 Q. That's what you're saying here on your website. You
3 look like you've never seen this before. Have you seen it
4 before?

5 A. I've seen this before. I helped put it together.

6 Q. You helped put it together but you can't remember who
7 Drinker, Biddle is, the very first list of the top of the
8 companies that provide 40 percent of your source funding; is
9 that right? Do I have that correct?

10 A. You've confused me, sir. I'm sorry. It's a company
11 that we --

12 Q. You're confused now, sir?

13 A. It's a company we did work for in 2012. You asked me a
14 specific question about them and I don't recall those details.

15 Q. ACI.

16 A. Right.

17 Q. Is that an industry outfit?

18 A. It's industry related.

19 Q. Eli Lilly. We've all heard of Eli Lilly. Another
20 pharmaceutical company.

21 NIPERA. What's NIPERA?

22 A. Nickel producers -- Nickel Institute for -- something
23 associated with the nickel institute.

24 Q. That's another industry outfit?

25 A. Yes.

1 Q. PPG?

2 A. I think they just refer to them as PPG Industries.

3 Q. They're another industry outfit?

4 A. Absolutely. They're all industry.

5 Q. And American Petroleum -- I want to take you through
6 some of the companies that your company has done work for and
7 one of them is the American Petroleum Institute, right?

8 A. That's correct.

9 Q. That's an industry organization, petroleum industry,
10 right?

11 A. That's correct.

12 Q. Let's do the 2013.

13 MR. DOUGLAS: May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. DOUGLAS:

16 Q. Sir, you recognize what you've just been handed as
17 another page from your website?

18 A. That's correct.

19 Q. That you helped put together, right?

20 A. Yes, I did.

21 Q. You'll see it's from 2013 for profit. 37 percent,
22 right?

23 A. That's correct.

24 Q. And again we see American Cleaning Institute, Amgen
25 again, American Chemistry Council, Eli Lilly again and

1 Genentech. You see that?

2 A. Yes, I do.

3 Q. Genentech is a chemical company. You saw Amgen. What
4 is Genentech?

5 A. I think it's a pharmaceutical company.

6 Q. Sir, you've written in the peer review I think you said
7 you lost count after 100, right, contributed to the peer review
8 literature?

9 A. Yes.

10 Q. And do you recall an article entitled *Peer consultation*
11 *on relationship between PAC profile and toxicity of petroleum*
12 *substances*?

13 A. Yes, I do.

14 MR. DOUGLAS: May I approach, Your Honor?

15 THE COURT: You may.

16 BY MR. DOUGLAS:

17 Q. We talked before about conflicts of interest. Do you
18 recall that when you were asked by Mr. Mace, what is a conflict
19 of interest?

20 A. Yes.

21 Q. And sort of the same idea of disclosure is in
22 acknowledgments that would be in a peer review journal, if
23 there are any, you would list them, right?

24 A. Right.

25 Q. Could we put the title page, please?

1 This is the article that I just asked you about, right?

2 A. Yes.

3 Q. And that's you, you authored this article?

4 A. Yes, sir.

5 Q. And if you just go to the second to last page, I think
6 it's the second to last, you'll see a section, conflict of
7 interest and below that, acknowledgments?

8 A. Yes.

9 Q. You see that? And it says, the American Petroleum
10 Institute, on behalf of the Petroleum High Production Volume
11 Testing Group, provided TERA with financial support for the
12 peer consultation meeting and preparation of the manuscript.

13 You see that?

14 A. Yes.

15 Q. You've written an article called *The importance of*
16 *problem formulations in risk assessment: A case study*
17 *involving dioxin-contaminated soil.* You recall that?

18 A. Yes, I do.

19 MR. DOUGLAS: May I approach?

20 THE COURT: You may.

21 BY MR. DOUGLAS:

22 Q. You have the article in your hand right now?

23 A. Yes, I do. Thank you.

24 Q. I have it displayed on the Elmo. And that's you, you're
25 the lead author on this?

1 A. Yes, I am.

2 Q. And if you go to, again, the second to last page.

3 Acknowledgment. The authors wish -- you're one of the authors,
4 right?

5 A. Yes.

6 Q. The authors wish to thank Robert Budinsky of the Dow
7 Chemical Company for his thoughtful comments on the early
8 drafts. You see that?

9 A. Yes, I do.

10 Q. By the way, you've received financial remuneration from
11 the Dow Chemical Company over the years, right? Your company
12 has?

13 A. On this particular paper?

14 Q. Not asking about this particular paper. Over the years
15 your company, TERA, has received financial remuneration from
16 Dow Chemical Company?

17 A. For several projects, yes.

18 Q. And you authored a piece called *Crystallographic*
19 *Analysis and Mimicking offers Estradiol Binding:*
20 *Interpretation and Speculation*. Do you recall that article?

21 A. I'd have to see that to make sure. That sounds like
22 letters to the editor.

23 Q. Well, I misspoke. It's a letter to the editor.

24 A. Right. And that was by Tom, the lead author, Thomas
25 Osimitz.

1 Q. Why don't I just give you a copy of it.

2 A. That works, yeah. Thanks.

3 MR. DOUGLAS: May I approach?

4 THE COURT: You may.

5 BY MR. DOUGLAS:

6 Q. Is that the article you had in mind?

7 A. Yeah. That's the letter to the editor.

8 Q. The letter. Excuse me. Let's put that up on the Elmo.

9 This is the title of the article, right, the letter?

10 A. Right.

11 Q. And that's you?

12 A. Right.

13 Q. Signing off as one of the people signing off on the
14 letter, right?

15 A. Yes.

16 Q. And it says, the work was supported by the North
17 American Flame Retardant Panel of the American Chemistry
18 Council which previously provided funding for travel expenses
19 and honoraria to the authors as members of NAFRA.

20 You see that?

21 A. Yes.

22 Q. So it would be another industry organization who has
23 supported or funded your work, right?

24 A. The TERA work, right.

25 Q. Just a moment.

1 A. No worries.

2 Q. You authored an article with a Dr. Samuel M. Cohen who
3 we're going to hear from in a little while called *Linear*
4 *low-dose extrapolation for noncancer health effects is the*
5 *exception, not the rule.* Do you recall that?

6 A. Yes, I do.

7 MR. DOUGLAS: May I approach?

8 THE COURT: You may.

9 BY MR. DOUGLAS:

10 Q. You have it in your hand, sir?

11 A. Yes, I do.

12 Q. First I want to ask about this fellow, Samuel M. Cohen.
13 You know him? You co-authored an article with him.

14 A. I know him.

15 Q. How long have you known Dr. Cohen?

16 A. I've known of him for probably a dozen years. Working
17 with him is infrequent.

18 Q. Did you know that he is a retained expert for DuPont in
19 this case?

20 A. No.

21 Q. Is that the first you're hearing of it?

22 A. Yes.

23 Q. He's going to take that very witness chair when you are
24 done? You didn't know that?

25 A. I didn't know that.

1 Q. And if you go to, I believe, again, the second to last
2 page, it might be the third to last page, under acknowledgments
3 and declaration of interest. You'll see it states, this paper
4 that you wrote or co-authored with Dr. Cohen, this paper was
5 prepared with financial support provided by the American
6 Chemistry Council to Gradco LLC doing business as Gradient.

7 You see that?

8 A. Yes.

9 Q. That's another industry company that's funded your
10 company TERA, correct?

11 A. Yeah. The American Chemistry Council through Gradient.

12 Q. Right.

13 A. Right. Gradient is a consulting group, it's not
14 industry. That's correct.

15 Q. We could go all day. I'll just do one more.

16 A. Sure.

17 MR. DOUGLAS: May I approach, Your Honor?

18 THE COURT: You may.

19 BY MR. DOUGLAS:

20 Q. You recognize what you are holding in your hand, sir?

21 A. Yes, I do.

22 Q. What is that?

23 A. A paper that was just recently published in the Journal
24 of Toxicology by my co-authors Rhian Cope who is now with the
25 Australian Authority for Medical Veterinary Sciences, Sam Kacew

1 up at the University of Ottawa and myself.

2 Q. If you go to the acknowledgments in this article. It
3 states, this research is performed by scientists with the MPI
4 Research located on North Main Street in Mattawan, Minnesota
5 (sic). This research is sponsored by Brominated Flame
6 Retardant Industry Panel of the American Chemistry Council
7 located at 700 Second Street in Washington, D.C. You see that?

8 A. Yes, I do.

9 Q. That's another company, another industry organization
10 that you have worked with, sir; is that correct?

11 A. That's correct.

12 Q. We could go through many, many more of your articles and
13 there are dozens of different chemical industry, pharmaceutical
14 industry and other industries that you have worked with over
15 the years, right?

16 A. That's correct.

17 THE COURT: Counsel, let me see you at side-bar for
18 just a moment.

19 You may stand by your seats, ladies and gentlemen.

20 - - -

21 Thereupon, the following proceeding was held at side-bar:

22 THE COURT: We've got a juror pretty much completely
23 out. I'm thinking of -- I'm think about maybe excusing him.
24 We had said we've got eight, seven or six.

25 MR. PAPANTONIO: Which one is it?

1 THE COURT: If you're looking at the front row, two in
2 from the left.

3 MR. DOUGLAS: Blue shirt.

4 THE COURT: Yes.

5 MR. DOUGLAS: Judge, if I can be heard on this. What
6 I noticed is he's almost, I call it the hound dog effect. It's
7 almost as if he's sleeping and all of a sudden he'll pop up and
8 he'll start taking notes.

9 THE COURT: I noticed that, too. I can't tell if he's
10 completely out or not. But I am concerned. None of us want
11 anybody to decide the case who hasn't heard the whole case.

12 MR. PAPANTONIO: We are very concerned about that.

13 THE COURT: That's why I keep doing this. It's not
14 working. Usually with most people it shakes them up a bit. I
15 noticed it seems to have no effect.

16 MR. MACE: What I have seen with jurors that they're
17 still listening even though their eyes are closed.

18 THE COURT: That's what we never know for sure.

19 MR. PAPANTONIO: Judge, here's what I've noticed also.
20 There are two jurors that keep looking down at him when he's
21 asleep almost as if they want to wake him up.

22 THE COURT: Right. I noticed that, too.

23 MR. PAPANTONIO: That's a very big concern of ours.

24 THE COURT: We can address that maybe at 5:00 today
25 but I'm thinking the other option would be for me to take him

in and just ask him is there anything we can do to help you, can you bring some coffee in with you. My guess is he's medicated, he's not doing this deliberately.

MR. MACE: We have no objection to your talking to him, Your Honor. Obviously in a discreet manner.

THE COURT: I'd do it privately unless there's an objection I'd just bring him in. Why don't we do that?

MR. PAPANTONIO: Judge, can we talk about it a little bit more before we do that?

THE COURT: All right.

MR. PAPANTONIO: But we have the same concerns. But so what we've been trying to put everything together and what we are observing is he keeps -- the other jurors keep looking at him like wake up.

THE COURT: Yes. That's my observation as well.

MR. MACE: I haven't observed that, for the record. I have not observed that.

THE COURT: Thank you.

Thereupon, the following proceedings were had in open court:

THE COURT: Mr. Douglas, you may continue.

BY MR. DOUGLAS:

Q. Just a few more questions.

1 Q. Sir, you would agree that risk assessment is an inexact
2 science?

3 A. Risk assessment is like a logic problem. It falls into
4 different disciplines of toxicology, epidemiology and other
5 disciplines, medical science. So it's imprecise.

6 Q. So you would agree that it's an inexact science?

7 A. Well, I think my views have changed a little bit over
8 the years but inexact is another way to say it, perhaps.

9 Q. You've written an article entitled *The inexact science*
10 *of risk assessment and implications for risk management*, right?

11 A. Yes. That was back in the late '90s, I believe. Which
12 is why I made the statement my views have changed somewhat.

13 Q. I'm going to ask you about some of the views you've
14 expressed in that article.

15 A. Thank you.

16 MR. MACE: Your Honor, may we approach?

17 THE COURT: I'll see you again at side-bar.

18 You may stand if you wish, ladies and gentlemen.

19 - - -

20 Thereupon, the following proceeding was held at side-bar:

21 THE COURT: Mr. Mace.

22 MR. MACE: Counsel has been dancing over the line but
23 now he's clearly crossing it asking opinion testimony that he's
24 excluded me from getting into with him. If he wants to open
25 the door to this.

1 THE COURT: Is this the article? How do you respond?

2 MR. DOUGLAS: The same way I responded before the
3 break, Your Honor. This witness was portrayed, was brought
4 here to testify about reliable -- he asked the witness to vouch
5 for the reliability. Whether that question was objectionable
6 and therefore it goes to the reasonableness of the company
7 relying on it.

8 THE COURT: I get that. But the trouble is this is a
9 different study. This is a general attack, not attack but it's
10 a limiting as far as so it doesn't go to this particular study.

11 MR. DOUGLAS: I'll move on.

12 - - -

13 Thereupon, the following proceedings were had in open
14 court:

15 THE COURT: Mr. Douglas, you may continue.

16 BY MR. DOUGLAS:

17 Q. You received that award there you brought with you to
18 court today from the West Virginia Department of -- from the
19 West Virginia DEP?

20 A. Yes.

21 Q. May I see it, please?

22 A. Sure.

23 MR. DOUGLAS: May I approach?

24 THE COURT: The deputy clerk would give it to you.

25 If you would.

1 BY MR. DOUGLAS:

2 Q. Did it come framed or did you have it framed?

3 A. I framed it.

4 Q. Did somebody ask you to bring it with you today?

5 A. Yes.

6 Q. Was that before or after you were subpoenaed to be here?

7 A. That was before.

8 Q. By the way, this subpoena is really just a charade for
9 the jurors, right?

10 A. I'm not sure what you mean.

11 Q. We talked before that you intended to come here even
12 before you were served with a subpoena. You recall that
13 testimony earlier?

14 A. I think the question was, I talked to Mr. Mace. I'll
15 try to get this correct. Talked to Mr. Mace several months ago
16 about questions of what we had in our file and then subsequent
17 to that, Mr. Mace indicated that there might be a trial and the
18 trial would be somewhere in the range of the end of September
19 so would you please consider holding that week available.

20 Q. And you did hold the week available?

21 A. The first three days available. And then last week I
22 found out it was going to be today.

23 Q. When did you find out it would be today?

24 A. Last week.

25 Q. Last week. So you've been planning to be here for quite

1 a while, right?

2 A. No.

3 Q. Well, you were planning to be here before you were even
4 served with the subpoena?

5 A. Yes.

6 Q. Weeks before, right?

7 A. I'm not sure what you mean by planning. I have it on my
8 schedule.

9 Q. Well, I think it's pretty simple but maybe I'm not being
10 articulate enough. You did tell us that you set aside this
11 week?

12 A. Right.

13 Q. Right? You planned on being -- you understand the word
14 planned?

15 A. It has -- planning is putting it on the schedule and
16 preparing for it.

17 Q. So you cooperated with Mr. Mace in setting aside time
18 three days out of this week to potentially testify at this
19 trial?

20 A. Yes.

21 Q. And you grabbed your little certificate here you got
22 from the DEP of West Virginia, right?

23 A. Yes.

24 Q. So you could show the jurors, hey, I got a certificate,
25 right?

1 MR. MACE: Your Honor, I object to the demeaning
2 nature of these questions, the whole attitude.

3 THE COURT: Listen, about side-bar, the objection is
4 sustained.

5 BY MR. DOUGLAS:

6 Q. Sir, were you told to bring your certificate?

7 A. I was not told to bring it. I was -- it was asked if I
8 would bring it and I said yes.

9 Q. Sir, this has to do -- you were given this certificate
10 for the work you did when you came up with this 150 parts per
11 billion, right?

12 A. We got the certificate for the work we did to
13 scientifically evaluate the information and came up with a
14 scientifically-based number.

15 Q. Which was 150 parts per billion?

16 A. For oral exposure, that's correct.

17 Q. Which was 150 times higher than what DuPont had already
18 set at the time you did your work, right?

19 A. That may or may not be true.

20 Q. You know that other states and other offices of
21 Environmental Protection have done risk assessments over time
22 both before and after your work?

23 A. Yes.

24 Q. And being naturally and intellectually curious, I'm sure
25 you're aware of these other results, right?

1 A. I'm aware in general terms of these other results, yes.

2 Q. I want to share a few of them with you for a moment.

3 Okay?

4 A. Certainly.

5 Q. I'm going to -- do we have that slide?

6 Bobby Rickard, Dr. Rickard had a report in this case and
7 he summarized all of the other risk assessment values that have
8 been done over the years. I'll just ask you to assume that.

9 A. Okay.

10 Q. My question was, were you aware of that, that
11 Dr. Rickard prepared a report in this case?

12 A. I'm not aware of that report.

13 MR. DOUGLAS: With counsel's permission.

14 THE COURT: Any objection, Mr. Mace?

15 MR. MACE: As long as it's clear this is not -- this
16 slide is not out of Dr. Rickard's report. It's something
17 counsel created.

18 BY MR. DOUGLAS:

19 Q. What this is, is the values were taken from
20 Dr. Rickard's report, which we'll establish when he testifies,
21 and summarized on this table that we did create, but taken from
22 his report.

23 So this is C-8 risk assessments over time for drinking
24 water per Dr. Rickard's report dated January 27, 2015.

25 THE COURT: Take that down while they're talking.

1 MR. MACE: Let me just note for the record, I noticed
2 an error. But he can use it. We'll just point out the error
3 later.

4 THE COURT: Put it back up.

5 BY MR. DOUGLAS:

6 Q. You see in 1988, DuPont had set a level of 1 part per
7 billion. We talked about that, right?

8 A. Yes. We talked about it.

9 Q. So your number, and by simple math of 150 parts per
10 billion, would be 150 times higher than that, right?

11 A. Well, you're making a comparison on the basis of one's
12 science generated and one is not. I don't think the comparison
13 is appropriate.

14 Q. Sir, let's just do the math and let the jury decide
15 what's science based. Your number of 150 parts per billion is
16 150 times higher than 1 part per billion, correct?

17 A. Again, sir, you're comparing different things.

18 Q. Sir, is 150 parts per billion 150 times higher than 1
19 part per billion?

20 A. That's easy to answer. It is.

21 Q. Thank you. And in 2002, Environ, a DuPont contractor,
22 had set a risk assessment of 14 parts per billion. I'm going
23 to ask you to assume that. Were you aware of that?

24 A. I don't believe so.

25 Q. And that would be, if my math is correct, 14 parts per

Vol. 12 - 100

1 billion or -- let's do it the other way around. 150 parts per
2 billion is more than ten times higher than 14, right? So the
3 number you got was over ten times higher than Environ, right?

4 A. That's correct.

5 Q. Not even close, right?

6 A. Is that a question?

7 Q. Yeah. Those two numbers are not close. Something
8 that's ten times higher than another value is not close. If
9 you're having trouble, I'll move on to another question.

10 A. You're, again -- I don't know the basis of the Environ
11 2002 assessment.

12 Q. They're all based on the same available information that
13 was out there that you based your -- that TERA found 150 parts
14 per billion, right?

15 MR. MACE: Objection. Compound. Assumes facts.

16 THE COURT: Rephrase the question.

17 BY MR. DOUGLAS:

18 Q. Let's just move on to Minnesota Department of Health.
19 Were you aware that they had formed a risk assessment and came
20 up with a value of 7 parts per billion in water?

21 A. I wasn't aware of that in 2002.

22 Q. But 150 parts per billion would be 20 times higher than
23 7 parts per billion, right?

24 A. If we're comparing just strictly numbers.

25 Q. Just numbers, sir?

Vol. 12 - 101

1 A. And assuming nothing else, then, sure, you could do the
2 math. It's easy.

3 Q. So the North Carolina Division of Water Quality found a
4 value limit of 2 parts per billion in water. Were you aware of
5 that?

6 A. No.

7 Q. And 150 parts per billion would be 75 times higher, sir,
8 than 2 parts per billion, right? Simple math?

9 A. Simple math.

10 Q. We can go down the list. You'll see Minnesota set a
11 limit of 1.5. Again, in 2013, North Carolina Division of Water
12 revisited the subject and lowered theirs to 1 part per billion.
13 And then were you aware of the Maine Center of Disease Control
14 set a value of .1? Were you aware of that, sir?

15 A. I'm not aware of that.

16 Q. Sir, did you know that the New Jersey Department of
17 Environmental Protection set a limit of .04 parts per billion?
18 .04, that's even lower than this .05 in 2006. Did you know
19 that.

20 A. I wasn't aware of that.

21 Q. Your value of 150 was a number, 150 parts per billion is
22 3,500 times higher than the value of .04.

23 THE COURT: Counsel, let me see you at side-bar.

24 You may stand if you wish, ladies and gentlemen.

25

1

- - -

2

Thereupon, the following proceeding was held at side-bar:

3

THE COURT: So this was a process witness as I understood, not an expert, and the process arguably would include what did you do before you came up with these numbers. But this is a 2002 report. How do the numbers that come after that play into this witness?

8

9

10

MR. DOUGLAS: I think it still goes to the reliability of the methodology. The result is so far off from every other organization that has ever looked at it.

11

12

13

THE COURT: You mean all the ones. A number of these were in existence before they completed their study. I have no issue with that. But there are things that come after.

14

15

16

MR. DOUGLAS: I think it still goes to the issue of getting it right and how unreliable this was. It was not reasonable.

17

18

19

THE COURT: Then what he's testifying to is the standard. I thought we agreed he was testifying as to the process?

20

21

22

23

MR. DOUGLAS: It is about the process. What I'm demonstrating is by virtue of the fact that his calculation was so off the reservation is that it wasn't reliable and it wasn't reasonable for the company to rely on it. It's so outlandish.

24

25

MR. MACE: I think he's opened the door pretty broad in this, Your Honor, and showing that slide I'm entitled to

1 refer back to that slide now.

2 THE COURT: Obviously. I wouldn't argue that point.
3 It's been used. I'm inclined to tell the jury that this
4 doesn't go to -- it doesn't go to -- it goes to the
5 reasonableness of the work done. That's the only basis they
6 can consider.

7 MR. DOUGLAS: That's what I'm offering it for.

8 THE COURT: I'd also not go along if you tell me to.
9 But it would be the defendant that's asking for it.

10 MR. MACE: I'm not asking for it.

11 THE COURT: Very good.

12 MR. PAPANTONIO: One other thing. The juror next to
13 number two one time had to nudge. I started watching.

14 THE COURT: The nudging is probably a good thing.

15 MR. PAPANTONIO: It is. It is. But I've been
16 thinking about the last conference, the last time we talked
17 about this. I think we're really prejudiced, both sides, to
18 have the Court say, you got to stay awake, because he doesn't
19 know where that comes from. And if we can continue to monitor
20 this, I literally saw --

21 MR. MACE: I think the courtroom deputy or somebody
22 could do it. I have no problem if one of the court staff does
23 it.

24 THE COURT: I'd be more concerned about that. First
25 of all, my bailiff isn't here. I know this fill-in bailiff

Vol. 12 - 104

1 really well but that's not part of what they're used to doing.

2 I also thought maybe let them bring coffee in.

3 MR. MACE: We have no objection to that. Probably a
4 good idea. I'd like to bring some myself, Your Honor.

5 THE COURT: It doesn't apply to anybody else.

6 MR. PAPANTONIO: What I'm concerned about is how much
7 has been missed. I really am very much concerned.

8 MR. MACE: I think Your Honor has been monitoring that
9 pretty well.

10 THE COURT: I'm trying to. Sometimes it works.

11 Sometimes it doesn't. We'll continue. Right now we're not
12 going to do anything.

13 - - -

14 Thereupon, the following proceedings were had in open
15 court:

16 THE COURT: Mr. Douglas, you may continue.

17 BY MR. DOUGLAS:

18 Q. So what I'm getting at is the reliability of your work
19 that you did back then and, sir, this is not the first time
20 that your risk assessment was very different than other
21 agencies or governmental agencies for other chemicals; is that
22 right?

23 A. That's correct. We did something for the State of West
24 Virginia just last year and we lowered the number by eight
25 fold.

1 Q. Well, I'm talking about Alachlor. Remember your company
2 did work on Alachlor?

3 A. Alachlor, I'm sorry. Acetochlor?

4 Q. Just a moment.

5 A. That's okay. Take your time.

6 Q. Thank you.

7 A. It's not always easy.

8 Q. You remember that your company, TERA, reviewed studies
9 that suggested serious health risks with respect to drinking
10 water in Wisconsin as a result of chemicals manufactured by the
11 company Monsanto. You recall that?

12 A. I believe that was the acetochlor which is an herbicide
13 and its degradation products in water, in ground water. I
14 think that's what you're referring to.

15 MR. DOUGLAS: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. MACE: May we approach, Your Honor?

18 THE COURT: Yes. You may stand if you wish, ladies
19 and gentlemen.

20 - - -

21 Thereupon, the following proceeding was held at side-bar:

22 MR. MACE: So our objection, Your Honor, would be --

23 MR. DOUGLAS: I'm not going to offer it.

24 MR. MACE: I don't want you displaying it. This is
25 another one of these media slander campaigns.

1 THE COURT: Let's do this. I'm going to be strict
2 about foundation. Ask him if he's seen this before, ask him if
3 he's familiar with it before we get into and no representation
4 of who did it.

5 MR. MACE: Or what they said.

6 THE COURT: Until there's some authentication. He's
7 not in the category, for example, of two or three DuPont
8 witnesses that I said could be crossed on things that they
9 maybe should have been aware of. He's not in that category.

10 MR. MACE: But, Your Honor, we'd object to how he used
11 the prior document like this repeating hearsay statements and
12 displaying them, even orally, to the Court.

13 THE COURT: Not necessarily saying I disagree. But
14 we're done with that. And we can bring it back on redirect.
15 But again, I encourage the adversarial process. You have to
16 tell me if there's something that you believe is inadmissible.

17 MR. MACE: I'm telling you now.

18 MR. DOUGLAS: Judge, just I think counsel jumped the
19 gun. I'm not going to offer this in evidence.

20 THE COURT: But even if you don't offer it, if you
21 describe it to the jury, essentially testifying. If he doesn't
22 have any knowledge.

23 MR. DOUGLAS: May I explain?

24 THE COURT: All right.

25 MR. DOUGLAS: There's a table in here that talks about

1 the values. I'm just going to use it to refresh his
2 recollection as to what his findings were and what the other
3 agencies were.

4 THE COURT: If he can identify it, has some idea,
5 that's what we'll see.

6 MR. DOUGLAS: That's all.

7 - - -

8 Thereupon, the following proceedings were had in open
9 court:

10 BY MR. DOUGLAS:

11 Q. Sir, I'm just going to ask you to turn to page 8.
12 That's a table on page 8.

13 A. Is this the latest copy of this? We talking about this
14 document or not?

15 Q. Sir, this document is not going to come into evidence.
16 There's a table I'd like to direct your attention to. If you
17 would just go to page 8.

18 A. Yes, sir. I have it.

19 Q. There's a chemical that is mentioned on that page in the
20 table. You see that?

21 A. I see six chemicals. Which one?

22 Q. The first one on the left.

23 A. Alachlor.

24 Q. And the one to the right is Alachlor ESA?

25 A. That's right.

1 Q. Do you recall that you were asked to do a risk
2 assessment to come up with a determination of level of parts
3 per billion were for Alachlor ESA? By you, I mean your
4 company?

5 A. We were not charged to do that, no.

6 Q. Do you see where it says Wisconsin? And in that matter,
7 Wisconsin determined a level of 20 parts per billion with
8 respect to this Alachlor ESA in the drinking water. Does that
9 sound about right to you?

10 A. That's what the table says, yes.

11 Q. Do you recall Minnesota came up with a value of 70 parts
12 per billion in its risk assessment advice?

13 A. That's what the table says, yes.

14 Q. And North Carolina came up with .4 parts per billion?

15 A. That's what the table says.

16 Q. And your company came up with 5,600 parts per billion?

17 A. That's not our number.

18 Q. That's not your number?

19 A. No, sir.

20 Q. That's wrong?

21 A. That's not correct. We were not charged to come up with
22 safe water levels. We were charged to come up with acceptable
23 daily intakes.

24 Q. And the value was 5,600 parts per billion?

25 A. That was determined by somebody else.

1 Q. It's not your company?

2 A. This isn't the latest version of the document. It's not
3 in evidence. We have an annotated version of this correcting
4 it along with a press release and it's on our website if you
5 wish to see it.

6 Q. Sir, your work was criticized. You talk about the
7 certificate but in fact the Little Hocking Water Association is
8 extremely critical of the work that you did, that TERA did in
9 this case; is that correct?

10 MR. MACE: Objection, Your Honor.

11 THE COURT: Objection is sustained.

12 THE WITNESS: Are we still on this?

13 BY MR. DOUGLAS:

14 Q. No. You can put that down.

15 A. Thanks.

16 MR. DOUGLAS: Those are all the questions I have for
17 you now, sir.

18 THE COURT: Mr. Mace, you may redirect.

19 - - -

20 REDIRECT EXAMINATION

21 BY MR. MACE:

22 Q. How are you doing, Doctor?

23 A. Good.

24 Q. Some of us have had too much caffeine today.

25 A. It's good to be here.

1 Q. Let me see if I can clear up a few things. Won't take
2 too long.

3 If we could bring up D613. So this is the CATT team
4 report. Could you go over to dot 3, page 3.

5 In terms of the contractor that you couldn't recall the
6 name of, does this refresh your recollection?

7 A. Yeah. Thank you.

8 Q. What was it?

9 A. The National -- that sounds right.

10 Q. National Institute for Chemical Studies?

11 A. Yes. Thank you.

12 Q. So your testimony was West Virginia hired this
13 contractor. The contractor hired you?

14 A. That's my understanding from my recollection.

15 Q. Let's go down to the bottom of the page and I wanted to
16 get -- in regard to these three doctors from EPA. Counsel
17 threw some rocks at you, your team. Are you aware of any
18 criticism that was ever made of any of those EPA scientists
19 that were on that CATT team?

20 A. Criticism from whom? I'm not aware of any criticism of
21 their participation on the CATT team.

22 Q. Or their work on the CATT team?

23 A. No. Not aware of any of that.

24 Q. What about from the Agency for Toxic Disease Registry,
25 Dr. Wheeler. Are you aware of anybody criticizing his work on

1 the CATT team?

2 A. I don't have any -- I'm not aware of anything along
3 those lines.

4 Q. Do you recall this Ohio EPA observer who was at the
5 meeting?

6 A. Right. I hadn't met him before. If he walked into the
7 room now, I wouldn't recognize him. There was an Ohio person
8 there.

9 Q. Counsel asked you about a couple organizations, the
10 Center for Public Integrity and Inside Climate. Are those
11 state or federal governmental agencies?

12 A. I don't believe so.

13 Q. And in the same article that he showed to you he read
14 you the first half of your sentence. We get criticized by
15 everyone. He didn't read the second half. But that doesn't
16 change the fact that TERA is neutral. Is that what you
17 actually said?

18 A. Yeah. Absolutely.

19 Q. He showed you Defendant's Exhibit -- P1.3232 and there
20 was an implication at one point that you had a phone
21 conversation with Dr. Rickard before the CATT team was formed.
22 Did you have any conversation with Dr. Rickard before the CATT
23 team was formed?

24 A. Not that I recall.

25 Q. So you referred to this e-mail from 2000 and words I

Vol. 12 - 112

1 don't think he emphasized, their ability to put together an
2 independent peer review panel. Is that what you did, put
3 together an independent peer review panel?

4 A. In the case of the CATT team, I think folks were already
5 chosen. I'm not so sure we actually put that panel together.
6 I'd have to go back and sort that.

7 Q. Was that part of Dr. Staats from West Virginia?

8 A. I believe that was already prearranged.

9 Q. You talked about your mission statement on the website.

10 MR. MACE: May I approach, Your Honor?

11 THE COURT: You may.

12 BY MR. MACE:

13 Q. I've handed you or the clerk has handed you a
14 demonstrative aid that we haven't marked as an exhibit. Do you
15 recognize that?

16 A. Yeah.

17 Q. What is that?

18 A. That's a page out of our TERA website.

19 Q. Could we bring that up, please? Let's bring up the
20 first couple paragraphs.

21 TERA was founded on the belief that an independent
22 nonprofit organization can provide a unique function to protect
23 human health by conducting scientific research and development
24 on risk issues in a transparent and collaborative fashion and
25 communicating the results widely.

1 Was that the attitude you brought toward your work on
2 the CATT team?

3 A. That's the attitude we bring with all our work,
4 including the CATT team.

5 Q. You refer to your mission being protection of public
6 health by developing, reviewing and communicating risk
7 assessment values and analyses. Is that what you brought to
8 bear with the CATT team?

9 A. Right. We didn't do much in the way of communication
10 but we certainly did do in the way of development.

11 Q. Were you aware that the State of West Virginia had
12 enlisted Dr. Becker from Marshall University and a couple other
13 people on the communication aspect?

14 A. I don't recall those details.

15 Q. You didn't get involved in that aspect of it?

16 A. Not at all. No.

17 Q. In terms of TERA's core principles and values, if we
18 could go down to that. Honesty and integrity, independence,
19 transparency, collaboration. Those are the core principles
20 you've tried to live by?

21 A. Absolutely. On a daily basis. And we try to always
22 improve it.

23 Q. Over at the third page there's a reference in the last
24 paragraph here. An award from the Independent Charities Seal
25 of Excellence. What's that about?

1 A. We were -- because we're a 501(c)3, a nonprofit
2 corporation, we're allowed to apply for the Combined Federal
3 Campaign. So what that is, it's federal workers can give their
4 money away. They can give it to charities. So the 501(c)3 tax
5 code allows us to be considered a charity even though we're a
6 science work, we're a charity by that definition and so we were
7 accepted into the campaign and of course there's a lot of them
8 operating and we were awarded the seal of excellence, which was
9 quite surprising, but we were humbled to get it.

10 Q. You refer to high standards of public accountability,
11 program effectiveness and cost effectiveness. That was part of
12 the consideration?

13 A. Oh, absolutely. Right.

14 Q. You referred to an Office of the Inspector General USEPA
15 evaluation. You're familiar with that report?

16 A. Yeah. Very familiar.

17 MR. MACE: May I approach the deputy, Your Honor?

18 THE COURT: You may.

19 BY MR. MACE:

20 Q. Again, we're using this as a demonstrative aid so it
21 doesn't have an exhibit number on it. You're familiar with
22 that report?

23 A. Yes, I am.

24 Q. Would you bring that first page up?

25 What --

1 MR. DOUGLAS: Your Honor, may we side-bar?

2 THE COURT: You may stand by your seats, ladies and
3 gentlemen, if you wish.

4 - - -

5 Thereupon, the following proceeding was held at side-bar:

6 MR. DOUGLAS: I don't understand how this is a
7 demonstrative issue not being shown to the jury. I don't know
8 what this is.

9 THE COURT: What's it connect to this?

10 MR. MACE: Counsel has impugned (sic).

11 MR. DOUGLAS: Impugned.

12 MR. MACE: Whatever he's done. Criticized the witness
13 and his organization. Plaintiffs' counsel has severely
14 criticized the witness and his organization and implied that
15 they are industry beholden and --

16 THE COURT: Here's TERA.

17 MR. MACE: So they're one of the people asked to
18 consult on this for the EPA and reviewed --

19 THE COURT: So they're in here. I get that. You just
20 don't want it displayed. You don't care if there's questions
21 about it.

22 MR. DOUGLAS: It shouldn't be displayed.

23 MR. MACE: What if I just do page four?

24 MR. DOUGLAS: Just ask him.

25 MR. PAPANTONIO: Just ask the question.

Vol. 12 - 116

1 MR. DOUGLAS: The witness is here to testify, not to
2 read documents.

3 THE COURT: I mean I'd say you're about even on that
4 score. And I have to tell you, both sides, that's been an
5 unusual method for me. I'm not used to that. But having said
6 that, you don't want any part of this in?

7 MR. DOUGLAS: No. It's collateral.

8 THE COURT: It's collateral. You can ask him. We'll
9 leave the document out at this time point.

10 - - -

11 Thereupon, the following proceedings were had in open
12 court:

13 BY MR. MACE:

14 Q. Doctor, can you describe the document for us? What's
15 that about?

16 MR. DOUGLAS: Objection, Your Honor. I think that's
17 the whole --

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: The Inspector General of USEPA was
20 looking at the Integrated Risk Information System process.
21 That's an agency unit and specifically the peer review within
22 it. Remember, when I was back at EPA our group helped develop
23 IRIS. It was mostly internal. Then I left EPA and it started
24 to get more influential, which is good, and it has these
25 external peer review panels, and there's lots of angst about

1 them from a variety of groups, not just industry. NGOs and
2 everybody, I suppose. So the Inspector General said, we're
3 going to look at the process. And unbeknownst to us, they
4 looked at the process and they pulled out examples of other
5 processes that were done well and they pulled out TERA as an
6 example comparability. And there's a table that shows
7 comparability with not only IRIS but also TERA and then four
8 other government organizations.

9 BY MR. MACE:

10 Q. So is this one of the records you referred to when
11 counsel was questioning you with regard to some of the rocks
12 that had been thrown at TERA by some outside organizations and
13 you were saying, well, the Inspector General had --

14 A. Yeah. That's it. Right.

15 Q. In terms of the review that was done by the Office of
16 Inspector General at USEPA, did they find that you had adequate
17 controls for conflict of interest and independent research to
18 identify potential panelist bias or conflict?

19 A. Yeah. We came across, in comparison, very good on that
20 issue and others as well. And they summarize in a table in the
21 appendix that's easy to see.

22 Q. Let's switch to a new topic. Counsel showed you a
23 couple documents. The 2012 project time by sponsor. And he
24 focused on the 40 percent for profit and some of the companies
25 there. But he ignored completely the 60 percent government

1 nonprofit. So could you tell us a little bit about what you
2 did for the National Library of Medicine over the years?

3 A. Yeah. In that particular -- that was 2012. I think
4 what we were doing is we put together a database of risk values
5 called international toxicity estimates for risk. It's freely
6 available, has lots of different people's risk values on it,
7 including those have been through independent vetted peer
8 review by our group but also the Dutch and the Health Canada
9 and EPA's IRIS.

10 Q. Refers to NIOSH, National Institute of Occupational
11 Safety and Health. What have you done for them over the years?

12 A. In that particular case, NIOSH is a group that protects
13 American workers. What we did that particular year, we've been
14 working with them every year, we were doing immediately
15 dangerous to life and health estimates. So in other words, you
16 got a worker goes into a place, there's a certain level in air.
17 If it's immediately dangerous to life and health, they're out
18 of there. We're determining those levels for NIOSH. We
19 actually got an award for that that's listed somewhere.

20 Q. That's enough.

21 A. Sure.

22 Q. I'm sorry to cut you off.

23 A. That's fine. I talk too much sometimes.

24 Q. Consumer Products Safety Commission. What have you done
25 for them over the years?

1 A. Right now we're doing a series of work on Phthalate
2 ester exposure information and there was a review team, a team
3 that was put together for the Phthalate esters and it was a
4 National Academy of Science structure team and we did an
5 independent peer review for that team. That team, National
6 Academy of Science team, wanted independent peer review and
7 Consumer Products tagged us to do that for them.

8 Q. I guess the bottom line on this graphic is in terms of
9 the amount of your funding that came from government nonprofit,
10 was it more than half, 60 percent?

11 A. Oh, yeah. Those are, yeah.

12 Q. So focusing on the 40 percent, the for profit, would
13 that be taking things out of context with regard to the overall
14 work?

15 A. Well, we try to be neutral and work for all parties. So
16 that's an important part of our work. Just focusing on one
17 part of it of course misses the rest.

18 Q. Then on the 2013 graphic, again, he focused on the
19 37 percent. But that year did you, as well, do 63 percent
20 government nonprofit?

21 A. Right. Yeah.

22 Q. You talked about some of these. What about Health
23 Canada, what have you done for them over the years?

24 A. We do a lot of work for Health Canada. We do a lot of
25 their independent peer reviews. They had something called

Vol. 12 - 120

1 Domestic Substances List. 23,000 chemicals. They whittle it
2 down, they write reports and we help review those reports.
3 That's one aspect. That's probably a large aspect. We've also
4 done other smaller tasks for them, independent peer reviews.

5 Q. And maybe you should clarify for us. What is Health
6 Canada?

7 A. Oh, it's -- Health Canada is the federal health agency
8 for Canada and that includes environmental protection for not
9 only humans but also ecological systems, birds, butterflies and
10 fish. And that's a large agency. And then they have separate
11 agencies like we do in the U.S. for occupational safety and
12 health and pesticide evaluations.

13 Q. So Health Canada would have, in Canada, the same
14 responsibility and even more than USEPA does in the United
15 States?

16 MR. DOUGLAS: Objection. It's leading. He's
17 testifying.

18 THE COURT: Rephrase.

19 BY MR. MACE:

20 Q. Does Health Canada, in Canada, do equivalent functions
21 to what USEPA does in the United States?

22 A. I would say that's correct.

23 Q. While we're on the context point. We went over this
24 graphic in your direct examination, you'll recall, in terms of
25 your work different years. You recall that?

1 A. Yes.

2 Q. And counsel chose to focus on two years that aren't even
3 on this page in 2012 and 2013. But back in the year that's at
4 issue for what you were brought here to testify about, the CATT
5 team, what was the percentage breakdown back then?

6 A. Yeah, it was 72/28. I think we also had a large USEPA
7 task, the World Trade Center disaster peer review. We did
8 that. That was in that year as well.

9 Q. Who was that done for?

10 A. We were approached by, this is a sad story of course.
11 The trade centers go down for the terrorist attack. A year
12 later, nine different government organizations had put together
13 a risk document and they invited us to -- asked us to do the
14 independent peer review. Exactly which agency asked us, I
15 think it was USEPA but I'm not sure.

16 Q. But any event, it was governmental agencies, not private
17 industry?

18 A. Right.

19 Q. All right. Then in terms of the overall, are the actual
20 numbers consistent with your testimony that, on average, about
21 two-thirds of your work is government and nonprofit work as
22 opposed to industry work?

23 A. That's correct.

24 Q. Counsel showed you a graphic, again I apologize for my
25 marks. That's all I have. You made a comment something about

Vol. 12 - 122

1 comparing apples to apples. What was your comment about that?

2 Counsel said, aren't these numbers different than this number?

3 A. Yeah. You can do the quantification, of course, but
4 that's not how scientists compare things. You have to
5 understand what goes into that number. What we did, per se,
6 was the ADI. Different states have different assumptions of
7 how much water is drunk, do they partition it to food or soil
8 or something. So there's other steps that go from the ADI,
9 which is what we did, and then of course use a set assumptions
10 to get to the level using West Virginia's assumptions.

11 I'm not sure what the other groups have done so it's
12 hard to compare. And I also know that there's other
13 organizations out there, the Committee on Toxicology of the
14 United Kingdom has a value as well.

15 So it's just a matter of you need to understand the
16 basis of the number before you start to compare one to another.

17 Q. Is that, again, an example of how you have to keep
18 things in context?

19 A. Well, you do. There's some differences in the
20 acceptable daily intake amongst these groups. They also are a
21 different time. It's 2014 versus 2002. So there had been --
22 science marches on and you should always incorporate the latest
23 science.

24 Q. In fairness -- so we have been using this calendar or
25 timeline. Your work, sir, on this CATT team was done in 2002?

1 A. Right.

2 Q. And counsel referred to this science panel report. That
3 came out in 2012, ten years later?

4 A. The science --

5 Q. Science panel he referred to. It's a poster over here?

6 A. Okay. Oh, that. Okay.

7 Q. 2012.

8 A. I had trouble with that as a fact, but whatever.

9 Q. Counsel showed you this graphic that's got numbers after
10 that time that have other values, right? After 2012?

11 A. Yeah. There's '13 and '14. Is that what you're --

12 Q. Yes.

13 THE COURT: I'll remind the jury, the numbers are
14 different don't have anything to do with the issues we've
15 talked about as far as general causation. They do have to do
16 with the state of knowledge that DuPont had at the time.

17 BY MR. MACE:

18 Q. Sir, I guess in closing, Mr. Douglas asked you about the
19 reliability of your work on the CATT team. Was your work in
20 2002 on the CATT team reliable based on the state of the
21 knowledge at that time?

22 A. Absolutely.

23 MR. MACE: Thank you. Nothing further.

24 THE COURT: Thank you. Recross, Mr. Douglas?

25 MR. DOUGLAS: Just a few.

1

- - -

2

RECROSS-EXAMINATION

3

BY MR. DOUGLAS:

4

Q. Just a few and we'll let you get back to Cincinnati.

5

Despite all the accolades we've been hearing about and
all this stuff you put on your website, you're in control of
what goes on the website, right?

8

A. That's right. Myself and my team.

9

Q. So to put that in context, it's your website. You
helped create what it says, right?

11

A. Well, we're a nonprofit. I don't own anything in the
nonprofit.

13

Q. I didn't ask anything about nonprofits. I'm asking you,
again, you participated in creating the website. All those
facts and figures, 40 percent industry, 60 percent nonprofit
and government, right?

17

A. It's our website.

18

Q. That's your website. You approved that, right?

19

A. Yes. It's our website, right.

20

Q. Despite all these accolades that we've been hearing
about, your certificate that you were asked to bring to court
and you obliged, somehow the folks at DuPont and other folks
who throw in -- other organizations, apparently, who are
throwing rocks at your company, have the impression that you're
in the business of blessing criteria, right?

1 A. You're asking me what?

2 Q. Some folks at DuPont, the folks at DuPont have the
3 impression, despite everything that we've heard from Mr. Mace,
4 that you're in the business of blessing criteria?

5 MR. MACE: Objection. Foundation.

6 THE COURT: You're asking him to speculate about what
7 people at DuPont knew.

8 MR. DOUGLAS: I'll rephrase.

9 BY MR. DOUGLAS:

10 Q. You see where it says blessing criteria?

11 A. Yes, I do.

12 Q. Let's read the sentence again together. One person from
13 another chemical company that used to work in the EPA's
14 criteria office in Cincinnati said that Mike enjoys a very good
15 reputation among the folks that are still in the business of
16 blessing criteria. You see where I read from?

17 A. Yes, I do.

18 MR. MACE: Objection. Foundation. Triple hearsay.

19 THE COURT: I understand this will be coming in
20 anyway. Starting with that. But there has to be some
21 foundation for this witness to be able to answer a question
22 about this document.

23 BY MR. DOUGLAS:

24 Q. My question, sir, is you are unaware of what the term
25 blessing criteria means?

1 A. I've never heard that phrase before.

2 Q. If I told you it means whitewashing science, does that
3 help you understand the phrase?

4 MR. MACE: Objection. Move to strike.

5 THE COURT: Objection is sustained. Don't answer it.

6 BY MR. DOUGLAS:

7 Q. You were asked just now on redirect about all these
8 folks that praised your work with the CATT team. You recall
9 those questions?

10 A. Some of them.

11 Q. But you do know, sir, that at the time you issued your
12 report, right after, the Little Hocking Water Association was
13 highly critical of your work, aren't they, the folks that were
14 drinking they water?

15 MR. MACE: Objection, Your Honor.

16 THE COURT: One moment. Do you know anything about
17 the report?

18 THE WITNESS: I don't think so.

19 THE COURT: There has to be a foundation. At this
20 point the objection is sustained.

21 BY MR. DOUGLAS:

22 Q. You don't recall, sir, that the screening level of 150
23 parts per billion established by your CATT team generated much
24 criticism and controversy when the results were released? You
25 don't remember that?

1 A. I don't think I'm aware of that.

2 Q. You did the work, sir. You took three, four weeks you
3 came up with this 150 number that is far different than any
4 number anybody else has come up with. Do you remember the
5 Little Hocking Water Association?

6 MR. MACE: Objection, Your Honor.

7 THE COURT: Do you have any knowledge of the water
8 association?

9 THE WITNESS: I don't have any recollection of knowing
10 that.

11 BY MR. DOUGLAS:

12 Q. Did you ever hear of Little Hocking?

13 A. Little Hocking?

14 Q. Yeah.

15 A. I think we have Hocking Hills in Ohio but I'm not sure
16 about Little Hocking.

17 Q. Have you ever heard of Toppers Plains?

18 A. I'm sorry?

19 Q. Ever heard of Toppers Plains?

20 A. I don't believe so.

21 Q. Sir, at the end of the day, the value that you and your
22 CATT team came up with, 150 parts per billion, is numerically
23 higher than this figure here, .05 parts per billion. We've
24 agreed it's numerically higher, right?

25 A. I don't agree with what's on that chart.

1 THE COURT: And that's something that, again, is not
2 at issue. The question is whether you agree with the number or
3 not.

4 BY MR. DOUGLAS:

5 Q. Do you agree your number of 150 parts per billion is
6 3,000 times higher than this .05 parts per billion, right,
7 numerically speaking? Let's keep it simple.

8 A. I'm in the business of comparing like to like.

9 Q. Just answer my question, sir.

10 MR. MACE: Objection to the question, Your Honor.

11 THE COURT: There's not a response to the question.
12 It's a straightforward question. If you can answer.

13 THE WITNESS: There is a difference between the number
14 150 and the number 0.5, yes, there's a difference.

15 BY MR. DOUGLAS:

16 Q. It's 3,000 times higher, correct?

17 A. There's a difference between the numbers. The basis of
18 those numbers are not, at least that one, is not intelligible
19 to me. So I have nothing more to say.

20 Q. This is completely unintelligible to you. That's what
21 you're saying?

22 A. The basis of that number I don't understand.

23 Q. You're here to testify about how great your work was
24 that you did in reaching 150 parts per billion. That's what
25 you said your work was reliable, right? Just think about the

1 question and answer only the question.

2 A. And we have a report that establishes a basis of that
3 number.

4 Q. Right.

5 A. All you have there is four lines.

6 THE COURT: Well, there's a lot more than four lines
7 there. And, Doctor, if you're not familiar with it, just leave
8 it at that. That's not a number picked out of the air.

9 THE WITNESS: I apologize.

10 BY MR. DOUGLAS:

11 Q. Would you agree if there were no emissions, if DuPont
12 didn't put this chemical C-8 into the drinking water of tens of
13 thousands of men, women and children that --

14 MR. MACE: Objection, Your Honor.

15 BY MR. DOUGLAS:

16 Q. There would be no need to be any of the work that you
17 did --

18 MR. MACE: Objection. Argumentative.

19 MR. DOUGLAS: -- if there were no C-8 in the water in
20 the first place.

21 THE COURT: Objection sustained.

22 MR. DOUGLAS: Those are all the questions I have.

23 THE COURT: Thank you, Doctor. You may step down.

24 Ladies and gentlemen, we'll be in recess for one hour.

25 (A recess was taken at 12:00 p.m.)

Vol. 12 - 130

1 WEDNESDAY AFTERNOON SESSION

2 SEPTEMBER 30, 2015

3 - - -

4 MR. MACE: Mr. Mace, call your next witness.

5 MR. DOUGLAS: Your Honor, may we go to side-bar?

6 THE COURT: I'll see you at side-bar. You may stand,
7 if you wish, ladies and gentlemen.

8 - - -

9 Thereupon, the following proceeding was held at side-bar
10 out of hearing of the jury:

11 THE COURT: What's the issue?

12 MR. DOUGLAS: I had a brief conversation with Mr. Mace
13 before we started just now, and I asked him if he had spoken to
14 the witness and let him know about the Court's ruling about
15 excluding the specific causation opinion.

16 THE COURT: You're way ahead of me. The next witness
17 is --

18 MR. MACE: Dr. Cohen.

19 MR. DOUGLAS: So it's excluded by the Court. And I
20 just want to make sure there's not going to be any fumbles.
21 When I asked Mr. Mace if he had spoken with the witness to make
22 sure there would be no -- I don't want any fumbles, and I
23 didn't get exactly a one hundred percent assurance.

24 THE COURT: I assume you've made it a point --

25 MR. MACE: Absolutely. We carefully read your

1 orders, all four of them.

2 MR. DOUGLAS: That's different than what you said to
3 me, but I appreciate you saying that. I was getting a little
4 nervous.

5 THE COURT: Understood.

6 MR. BILOTT: One of the prior limiting instructions we
7 had asked about was the obesity limiting instruction. I
8 believe the Court deferred on that because the issue with Dr.
9 Cohen was still pending and hadn't been resolved yet. So
10 plaintiffs would still like a limiting instruction on obesity.
11 This is the prior one that was proposed.

12 THE COURT: I'll look at it.

13 (Back in open court.)

14 THE COURT: Mr. Mace, now you may proceed.

15 MR. MACE: The defense calls Dr. Cohen to the stand.

16 (Witness sworn.)

17 THE COURT: Mr. Mace, you may proceed.

18 MR. MACE: Thank you, Judge.

19 - - -

20 SAMUEL COHEN, M.D., Ph.D.,

21 Called as a witness on behalf of the Defendant, being first
22 duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. MACE:

25 Q Good afternoon, sir.

1 A Good afternoon.

2 Q Could you state your name for the record?

3 A Samuel Cohen.

4 Q And where do you live, sir?

5 A In Omaha, Nebraska.

6 Q What do you do for a living?

7 A I'm a physician and scientist.

8 Q Do you have a specialty?

9 A My medical specialty is pathology and my scientific
10 specialty is chemical carcinogenesis and toxicology.

11 THE COURT: I missed the first part. Your specialty
12 is --

13 THE WITNESS: The medical specialty is pathology and
14 specifically surgical pathology, and my scientific specialty is
15 chemical carcinogenesis and toxicology.

16 BY MR. MACE:

17 Q Dr. Cohen, if you can keep the microphone closer to your
18 mouth without banging into it, it would make it easier for us
19 all.

20 Doctor, have we asked you to review Dr. Bahnsen's expert
21 report and his two depositions and his trial testimony
22 regarding the specific causation issues in this case?

23 A Yes.

24 Q Are you knowledgeable regarding risk factors for kidney
25 cancer and the relationship between obesity and kidney cancer?

1 A Yes.

2 Q Have you analyzed those issues?

3 A Yes.

4 Q And have you reached opinions on those issues to a
5 reasonable degree of scientific certainty?

6 A Yes.

7 Q Before we get into the details of your analysis and your
8 opinions, let's spend a little bit of time on your personal
9 qualifications in order to talk to the jury on the specific
10 issues in this case.

11 Where do you currently work?

12 A At the University of Nebraska Medical Center in Omaha,
13 Nebraska.

14 Q What do you do there?

15 A I'm a professor of pathology and microbiology and also
16 of the cancer center. I do surgical pathology, research and
17 teaching.

18 Q Do you have an endowed professorship?

19 A Yes.

20 Q And what does that mean?

21 A An endowed professorship is both an honor and provides
22 financial support that I can use for my research laboratory.
23 It's specifically an oncology or cancer research.

24 Q Who provides the funding for that?

25 A Private donors.

Vol. 12 - 134

1 Q How long have you been a professor at the University of
2 Nebraska?

3 A Since 1981.

4 MR. MACE: May I approach?

5 THE COURT: Yes.

6 BY MR. MACE:

7 Q Professor, Doctor, you've been handed Exhibit D1461. Do
8 you recognize that?

9 A Yes.

10 Q What is that?

11 A It's my curriculum vitae.

12 Q Is that a true and accurate copy?

13 A Yes. I don't know what date this is, but reasonably
14 recent.

15 Q Let's --

16 MR. MACE: Can you bring up 1461?

17 BY MR. MACE:

18 Q Doctor, why don't you first take us through your
19 education and training.

20 A Okay. I went to the University of Wisconsin in Madison
21 for all of my degrees, beginning with my bachelor's degree in
22 medical sciences, graduated in 1967. Then I did an M.D. and
23 Ph.D. degree combined, with an M.D. in general medicine and the
24 Ph.D. in experimental cancer research, or oncology.

25 I then went to Saint Vincent Hospital in Worcester,

1 Massachusetts, for my residency in pathology which went from
2 1972 to 1975, became board certified in 1976.

3 Q You talked about experimental oncology. What is that?

4 A Cancer research.

5 Q And for your graduate work, what type of research did
6 you do?

7 A My graduate research was on chemical carcinogenesis and
8 predominantly on a class of compounds called Nitrofurans, which
9 were used as antibacterial food additives or preservatives and
10 other anti-organism-type of drugs.

11 Q What about your career? What is your career specialized
12 in?

13 A My career is specialized in a combination of surgical
14 pathology with an emphasis predominantly on the lower urinary
15 tract, also including the kidney; did kidney pathology for a
16 number of years.

17 And then in research, it's been focused on chemical
18 causation of cancer as well as other toxic endpoints, again,
19 initially, with an emphasis on the bladder but ultimately in a
20 number of other tissues including the kidney and liver.

21 Q Are you board certified?

22 A I'm board certified in anatomic and clinical pathology.

23 Q What does that mean to be board certified?

24 A That's a national organization that basically certifies
25 that I have been properly trained and passed an examination

1 that qualifies me to practice pathology.

2 Q Have you served on any national or international
3 committees and panels for government agencies?

4 A Numerous ones.

5 Q Would you list some of them for us.

6 A A number of them for National Institutes of Health.

7 Also the National Toxicology Program and the National Institute
8 of Environmental Health Sciences which are institutes within
9 the NIH.

10 I've also served on a number of panels for the
11 Environmental Protection Agency, or EPA, and also for the Food
12 and Drug Administration.

13 Internationally, I've been involved with a couple of
14 organizations within the World Health Organization, including
15 the International Agency for Research on Cancer, and also the
16 International Program on Chemical Safety. And then there's
17 been a bunch of others here and there over the years both
18 internationally and for other national organizations.

19 Q You mentioned the International Agency for Research on
20 Cancer. Is that known as IARC?

21 A Yes.

22 Q You're familiar with something called the International
23 Life Sciences Institute?

24 A Yes.

25 Q What is that?

1 A That's a private, not-for-profit organization that
2 brings together scientists from government academia and
3 industry to work on specific issues related to predominately
4 through risk assessment and safety of chemicals.

5 Q What's been your involvement with that organization?

6 A I've been involved with it both on research programs,
7 pathology programs, as well as serving on the board of
8 trustees.

9 Q Are you familiar with an organization, the NTP
10 Scientific Board of Counselors.

11 A Yes. That's the National Toxicology Program which is
12 under the aegis of the National Institute of Environmental
13 Health Sciences. And I've served in a number of roles there,
14 but on the board of scientific counselors for a period of two
15 years more than a decade ago.

16 Q Have you been involved with the Food and Drug
17 Administration and the FEMA expert panel?

18 A Yes.

19 Q What does that panel do?

20 A We evaluate the safety of flavor ingredients, and we're
21 essentially the organization that evaluates any applicant that
22 wants to sell an ingredient as a flavor, we have to approve it
23 first before it's allowed to be sold in the United States.

24 Q What is your role on that?

25 A I've been on the panel since 2002 and I'm currently the

1 chair of the panel.

2 Q Has the Food and Drug Administration, the FDA, consulted
3 with you outside of the FEMA expert panel?

4 A Yes.

5 Q Can you give us an example or two on that?

6 A I've actually taught courses with them. I've served on
7 promotion and tenure committees for them. And then probably
8 most noteworthy was about seven or eight or nine years ago I
9 was called by the commissioner of the Food and Drug
10 Administration regarding the safety of a chemical called
11 melamine which had been an adulterant from China in a number of
12 pet foods that harmed cats and dogs.

13 It turned out that it had also been put into food that
14 had been given to pigs, chickens and fish which meant that it
15 was now in the human food supply. And the commissioner was
16 asking five of us independently -- he wouldn't tell any of us
17 who the other ones were, that we independently review the
18 safety of melamine and its amount in the food supply and for
19 humans. And if any one of us came to a determination that
20 there was a safety concern, that they would have to pull over a
21 billion dollars of food off the market.

22 Q Doctor, have you received any awards for your research?

23 A Yes.

24 Q Could you list a few of those?

25 A Most notably is the Arnold Lehman award from the Society

1 of Toxicology which is for achievements in risk assessment.

2 I've been awarded an award from the Japanese Cancer Association
3 for my work overall in chemical carcinogenesis. And I'm about,
4 in a couple of weeks, to receive the Lifetime Achievement Award
5 from the Society of Toxicologic Pathology.

6 Q Did you also receive a Lifetime Achievement Award from
7 the Association for Environmental Health and Sciences?

8 A Yes, that was a couple of years ago.

9 Q Have you written any chapters in any books?

10 A I've written approximately 50.

11 Q Do you have any articles that have been published in
12 peer-reviewed scientific journals?

13 A I've had over 350 articles published in peer-reviewed
14 journals.

15 Q What does that mean, peer-reviewed scientific journal?

16 A These are scientific journals where when you submit a
17 manuscript to them, they send it out to at least two other
18 scientists to review it, which are basically peer reviewed,
19 sometimes more. And depending on the comments of the
20 reviewers, you make revisions or it's accepted or rejected.
21 But eventually, if it's to be published, it has to pass the
22 concerns of those reviewers.

23 Q Are you on any editorial boards?

24 A I currently am on four or five, plus I'm an associate
25 editor for another journal. I served on a number of other

Vol. 12 - 140

1 editorial boards and associate editorships over the years, and
2 I've peer reviewed for probably ninety to a hundred different
3 journals over the years.

4 Q What does it mean to be on an editorial board?

5 A An editorial board is both an honor. It's recognizing
6 outstanding individuals in those respected fields that the
7 journal is related to. And then it also basically commits you
8 to providing reviewer -- reviews of manuscripts that come into
9 the journal.

10 The associate editorship, in contrast, is where you
11 actually are the one that receives the article and then assigns
12 that to specific peer reviewers.

13 Q Your résumé, or CV, as I look at it here, Doctor, it's
14 about 119 pages long?

15 A It sounds about right.

16 Q And you list a number of your articles, presentations,
17 awards you've received beyond what you just described to us?

18 A Yes.

19 Q Do you think it will be helpful to the jury to have that
20 to terms of evaluating your qualifications?

21 A I hope so.

22 Q Doctor, now that we know some of your qualifications,
23 let's talk about kidney cancer for a few minutes. First of
24 all, what type of kidney cancer did Mrs. Bartlett have?

25 A Mrs. Bartlett had what's called clear cell renal cell

1 carcinoma.

2 Q Does that type of cancer commonly occur throughout the
3 general United States population?

4 A Yes.

5 Q Approximately how much?

6 A Kidney cancer in totally is about 2 to 3 percent of all
7 the cancer deaths in the United States. And out of that 2 to 3
8 percent, probably 80 to 85 percent are the so-called clear cell
9 carcinoma-type.

10 Q Was there anything atypical in Mrs. Bartlett's
11 presentation?

12 A No.

13 Q Now, what grade and stage was Mrs. Bartlett's tumor at
14 the time it was removed?

15 A It was a Grade 1, Stage 1 tumor.

16 Q Can you explain to us what that means?

17 A Grade is essentially the extent of differentiation of
18 the tumor. The lower the grade, the more similar it is to the
19 tissue it arose from. For Grade 1, it will look a lot like the
20 normal kidney.

21 Stage, in contrast, is the extent of the disease. If
22 it's Stage 1, that means it's confined to the kidney. It
23 hasn't spread beyond the kidney, and it also means it's smaller
24 than 7 centimeters in diameter, or about three inches.

25 Q What's the significance of it being a Grade 1, Stage 1

1 at the time it was removed?

2 A The grade and stage are what's used to help formulate
3 both the evaluation for prognosis, as well as for what
4 additional therapy, if any, needs to be done and how the
5 patient is going to be followed going forward.

6 Q Let's talk about each of those. First of all, in the
7 follow-up treatment, what does Grade 1, Stage 1 mean in terms
8 of follow-up treatment?

9 A Generally, Grade 1, Stage 1 is treated only with
10 surgery. It doesn't require chemotherapy and/or radiation
11 therapy. And it usually doesn't require additional surgery,
12 just the initial removal of the tumor itself.

13 Q And then you said - what? - prognosis? What does it
14 have to do with prognosis?

15 A Prognosis is essentially an estimate of what the
16 likelihood is for the recurrence of the disease or progression
17 of the disease. Grade 1, Stage 1 usually means that the tumor
18 is going to be cured with surgery and that it will not recur.

19 Q And that determination -- so the Grade 1, Stage 1,
20 you're aware that Mrs. Bartlett had her tumor removed. It was
21 sent to a pathologist who made that determination within a day,
22 if not the same day that her surgery occurred?

23 A Correct. I believe in the pathology report that I saw,
24 that she had a frozen section done at the time of surgery which
25 both gave the diagnosis, but, more importantly, is an

Vol. 12 - 143

1 evaluation of what's called the margins, to make sure that the
2 surgeon had taken all of the tumor and there's no tumor
3 extending to the margin.

4 Q What's the significance of that?

5 A Basically, it tells the surgeon that he's gotten all of
6 the tumor and that he doesn't have to take more kidney tissue.
7 For the procedure that Mrs. Bartlett had, which was a partial
8 nephrectomy, that means he can preserve as much of the kidney
9 as possible.

10 Q So the day of the surgery, it's found out that it's
11 clear margins and Grade 1, Stage 1. What was known then at
12 that time, the day of surgery, about her prognosis?

13 A Probably at the time of frozen section, they wouldn't
14 have given a grade. They would have said there's no extension
15 to the margin. On examination the next day when they have
16 permanent sections paraffin-embedded and formalin-fixed, that
17 they would find out that it's Grade 1, because you would sample
18 more of the tumor.

19 Q Let's go to day two. I was on day one. Let's go to day
20 two. Day two, once you have the permanent specimen and you
21 know it's Grade 1, Stage 1, and you know the report from the
22 day, clear margins, you got it all, what does that tell you
23 right then about prognosis?

24 A Basically, it tells you that it's a patient who has been
25 treated completely and has an excellent prognosis and is

1 unlikely to have a recurrence or progression of the disease.

2 Q Now, in terms of the size of the tumor when it was
3 removed, do you recall that?

4 A Yes.

5 Q What was it?

6 A I believe the largest diameter was 3.2 centimeters.

7 Q Now, do these types of Grade 1, Stage 1 renal cell
8 kidney cancer tumors tend to be slow growing or rapidly
9 growing?

10 A They tend to be very slow growing.

11 Q Sir, one of the materials that Dr. Bahnsen referenced
12 that he refers to was the American Urological Association
13 *Guideline for Management of the Clinical Stage 1 Renal Mass*.

14 MR. MACE: May I approach, Your Honor?

15 THE COURT: You may.

16 BY MR. MACE:

17 Q Dr. Cohen, we've handed you what's called here the
18 *Guideline for Management of the Clinical Stage 1 Renal Mass*,
19 American Urological Association. Are you familiar with this
20 publication?

21 A Yes.

22 Q Do you consider it authoritative?

23 A Yes.

24 MR. MACE: For reference purposes, we're going to tag
25 this as Defendant's Exhibit 2456. Could I have the ELMO,

1 please?

2 BY MR. MACE:

3 Q So that's the document you've got in front of you there,
4 Doctor?

5 A Yes.

6 Q I don't want to spend too much time on this, but let's
7 look at a couple parts of it. If you could turn over, after
8 the index, to page one. In the introduction, it's estimating
9 approximately 54,000 new cases of kidney cancer will be
10 diagnosed in the United States -- this was back in '08 -- and
11 that renal cell carcinoma, RCC, account for approximately
12 85 percent of the kidney cancers diagnosed in the U.S.

13 That's similar to the statistic you used?

14 A Yes.

15 Q All right. Over to the next page, it's got a section on
16 etiology. Can you explain to us what that term means?

17 A Etiology is another word for causation or cause.

18 Q There's some other phrases we'll talk about later.

19 Another phrase that's been used at trial is diagnosis. What is
20 diagnosis?

21 A Diagnosis is just a statement of what the disease is
22 that you're dealing with.

23 Q Is that different than etiology?

24 A Yes. Diagnosis is the disease. Etiology is the cause
25 of the disease.

1 Q Under etiology, the American Urological Association
2 says, Tobacco use and obesity are the most consistently
3 identified risk factors for renal cell carcinoma, accounting
4 for about 20 percent and 30 percent of cases respectively.

5 Are you familiar with that statistic?

6 A Yes.

7 Q Do you agree with that statistic?

8 A It's in the same ballpark. Other publications have had
9 estimates for a little bit higher, some a little bit lower.

10 Q The next sentence has a statement about hypertension.

11 Hypertension has also been demonstrated to increase the
12 risk of renal cell carcinoma development.

13 Do you recognize hypertension as a risk factor for
14 kidney cancer?

15 A Yes.

16 Q We were talking about the rate of growth. If you could
17 turn over to page 28. Do you see, sir, at the bottom of that
18 page, it's got a section on summary of the treatment options
19 for the clinical Stage 1 renal mass, right?

20 A Yes.

21 Q And the sentence that carries over, it says a meta --

22 MR. DOUGLAS: Your Honor, may we approach?

23 THE COURT: I'll see you at side-bar.

24

25

1

- - -

2

Thereupon, the following proceeding was held at side-bar
out of hearing of the jury:

4

MR. DOUGLAS: Judge, this is a completely unequivocal
opinion. This document, first of all, wasn't exchanged with me
prior to -- I received some documents at 12:38 a.m. So I was
lead to believe -- it was one new document.

8

THE COURT: What's the opinion you're claiming is new?

9

MR. DOUGLAS: There was reference here to the rate of
growth of tumors. There is nothing whatsoever in the doctor's
report about rate of growth. And I would also say that this is
a back door --

13

MR. MACE: Let me get his report.

14

THE COURT: Any rough idea where you are
schedule-wise?

16

MS. NIEHAUS: I don't --

17

THE COURT: Not so much with this witness but just
overall when you think you might finish the defense case.

19

MS. NIEHAUS: We're hoping by the end of this week or
early next week.

21

THE COURT: So we're on schedule.

22

MS. NIEHAUS: The cross-exam.

23

THE COURT: Blame it on that if it's going to go over.

24

MS. NIEHAUS: Of course.

25

MR. DOUGLAS: I was in mid-sentence. And I'm

1 concerned --

2 MR. MACE: I was trying to get my materials.

3 MR. DOUGLAS: That's all right. So first of all, this
4 is reference to rate of growth of --

5 THE COURT: You've got to educate me. First of all,
6 what does it have to do with rate of growth?

7 MR. MACE: In terms of when her tumor began. It's a
8 rebuttal to Dr. Bahnsen who said if, you will recall, I think
9 it was at least six months before but less than three years
10 before, which that raises an entirely new opinion. Nowhere in
11 his deposition, nowhere in his report --

12 THE COURT: I'm still not understanding. What do you
13 expect him to say?

14 MR. MACE: I'm permitted to --

15 THE COURT: What do you expect him to say?

16 MR. MACE: More than ten years.

17 MR. DOUGLAS: This is a back door way of giving a
18 specific causation opinion. One plus one equals no causation.
19 If you do the math, it will take him back ten years, at least.
20 This is -- you don't say the words but the conclusion is --

21 THE COURT: Her use of the water goes back to '81 or
22 '83, right?

23 MR. DOUGLAS: I appreciate that, but I don't think
24 it's a no-harm-no-foul-type of argument. It's the cumulative
25 years of exposure. It's been excluded on specific causation.

Vol. 12 - 149

1 THE COURT: Hang on. Do you have anything here in his
2 report that gets --

3 MR. MACE: I know he says that.

4 MS. NIEHAUS: I know we've cited it in some briefs, I
5 believe, and discussed it at his deposition as well.

6 MR. MACE: It's a long report. I should be able to
7 find it.

8 MR. DOUGLAS: It is certainly not cited in that
9 report.

10 THE COURT: Let me see that.

11 MR. DOUGLAS: It continues here, and .28.

12 THE COURT: It's the growth rate. That's what you're
13 focused on?

14 MR. DOUGLAS: Yes. If you do the math -- and he will
15 give a specific causation opinion.

16 THE COURT: No. He's not going to give a specific
17 causation opinion.

18 MR. DOUGLAS: I'm afraid that putting the two facts
19 out there --

20 THE COURT: This would go to duration of exposure for
21 the cancer. I see that issue. But I don't see how it leads us
22 into a differential diagnosis.

23 MR. DOUGLAS: I think specific causation does depend
24 on cumulative years of exposure. I think that's important.

25 THE COURT: Your doctor testified to something

1 different. Why wouldn't this be rebuttal?

2 MR. DOUGLAS: Because this is -- this goes to specific
3 causation, first of all. And second of all, he can disagree.
4 He's free to disagree, but this is --

5 MR. BILOTT: This particular witness is one that
6 cannot rebut any specific causation argument.

7 THE COURT: Wait. Right now all I'm hearing is the
8 rate of growth.

9 MR. MACE: He's rebutting what their doctor said on
10 the stand, which he talked about rate of growth.

11 THE COURT: Let's do this. You question him by:
12 There's been testimony previously that says X. Is that your
13 belief?

14 And the jury will get the idea that there's a
15 difference. And we're only talking about rate of growth,
16 that's it; not talking about anything beyond that. I do think
17 you're entitled to a limiting instruction. Let me read it to
18 you, and I'll ask your opinion.

19 There's no easy way to say this. But this is how I'm
20 thinking, a little bit of what you offered, the first sentence.
21 You may hear evidence in this case relating to an alleged
22 relationship between obesity and kidney cancer. But you should
23 understand that no expert or other witness in this case is
24 actually offering any medical opinion that obesity, and not
25 C-8, was the specific cause of Mrs. Bartlett's kidney cancer in

1 this case.

2 Mrs. Bartlett has offered medical opinion testimony that
3 her kidney cancer was caused by C-8 in the drinking water. Any
4 evidence relating to obesity as potential cause of her kidney
5 cancer may be considered only as an attempt to discredit the
6 evidence supporting her claim that C-8 caused her kidney
7 cancer.

8 Any problem with that?

9 MR. MACE: We preserve all of our prior objections.

10 THE COURT: Sure. I mean, where we are right now,
11 does that satisfy you?

12 MR. BILOTT: (Nods head.)

13 THE COURT: At this point you're not in obesity. Are
14 we coming back to that?

15 MR. MACE: Yes, sir.

16 THE COURT: When we come back to that, I'll come back
17 to you.

18 MR. MACE: It tends to be slow going.

19 THE COURT: Again, to make sure it's rebutted,
20 indicate there has been a conflict in the testimony by the
21 other doctor.

22 MR. DOUGLAS: Is he permitted to cite to this
23 statistic that's been disclosed?

24 THE COURT: Yes. Well, what about the disclosure
25 issue?

1 MR. MACE: Because Dr. Bahnsen acknowledged this
2 statistic as being an accurate statistic in his testimony and
3 he's in rebuttal to Dr. Bahnsen's testimony.

4 THE COURT: Not if Dr. Bahnsen says the same thing.
5 That wouldn't be rebuttal.

6 MR. MACE: Dr. Bahnsen knows of this data and didn't
7 do the calculation.

8 MR. DOUGLAS: If anything, it tells us the doctor was
9 aware of the issue and had every opportunity to cite whatever
10 statistic he wanted to cite.

11 THE COURT: The rate of growth -- limited to the rate
12 of growth. Thank you. And the article.

13 MR. MACE: All right.

14 (Back in open court.)

15 THE COURT: Thank you for your patience.

16 BY MR. MACE:

17 Q Doctor, a little foundation before we get back to the
18 document. You've read -- we have asked you to read not only
19 Dr. Bahnsen's expert report. You've read that?

20 A Yes.

21 Q You've read both his depositions, his 2014 deposition
22 last summer and his 2015 deposition earlier this year?

23 A Yes.

24 Q And you've also reviewed his transcript from the trial
25 about a week ago when he testified in front of the jury?

1 A Yes.

2 Q Do you recall that as part of that testimony in front of
3 the jury, he talked about rate of growth?

4 A Yes.

5 Q And he made some comments - correct me if I'm wrong,
6 that in his view, the tumor had to start at least six months
7 before it was removed, but he thought probably less than three
8 years before it was removed. Do you remember that testimony?

9 A I don't remember the exact numbers, but that sounds
10 about right.

11 Q And do you agree or disagree with his estimate of how
12 far back the tumor started?

13 A I would disagree.

14 Q Now, as part of that testimony in court, do you recall
15 that Dr. Bahnson was referred to this publication, the
16 *Guideline for Management of Clinical Stage 1 Renal Mass*,
17 American Urological Association?

18 A Yes.

19 Q He said that was one of the things he references, that
20 body of work from time to time?

21 A Yes.

22 Q And you've already testified you consider that to be an
23 authoritative source?

24 A Yes.

25 MR. MACE: So we have it on the screen. So, if you

1 could bring up -- we're between two pages. If you could bring
2 up the bottom of page 28 and top of page 29, next to each
3 other.

4 BY MR. MACE:

5 Q Where we were is the carryover sentence that says, A
6 meta-analysis of this literature demonstrated an average growth
7 rate of only 0.28 centimeters per year?

8 A Yes.

9 Q First of all, can you tell us what a meta-analysis is?

10 A It's basically a statistical analysis of several studies
11 where you put the total populations together and do an overall
12 evaluation.

13 Q And with a tumor that measured 3.2 centimeters and a
14 growth rate at this number that Dr. Bahnsen agreed with, when
15 would that indicate that Mrs. Bartlett's tumor started?

16 A At a growth rate of .28 centimeters per year, this would
17 translate out to a tumor that's 3.2 centimeters in diameter
18 over ten years, so about 11, 11 and a half.

19 Q Doctor, we asked you to analyze Dr. Bahnsen's specific
20 causation opinions, true?

21 A Yes.

22 Q Let's get one thing very clear. Just because a
23 substance is capable of causing kidney cancer, does that
24 necessarily mean that it actually caused it in a specific
25 individual?

1 A No.

2 Q Is there an example you can use to help us understand
3 that?

4 A I think probably the easiest example to keep in mind is
5 a substance called aflatoxin, which is a well-known and potent
6 liver carcinogen that's present as a contaminant of peanut
7 products. We're able to analyze it down to very small amounts
8 so it turns out that it's present in all peanut products. So
9 it's peanuts, peanut butter, anything that contains peanuts
10 will contain some aflatoxin. We can set a level that we
11 consider and the FDA now considers to be a safe level even
12 though we know this is a substance that can produce liver
13 cancer in humans.

14 Q Let's focus on one of the other opinions that
15 Dr. Bahnson gave. Did you read his opinion about whether
16 obesity should be considered a risk factor for kidney cancer?

17 A I did read that, yes.

18 Q Did you see his testimony that, in his view, obesity is
19 not a risk factor for kidney cancer? Did you see that opinion?

20 A I did see that, yes.

21 Q Do you agree or disagree with that opinion?

22 A I disagree.

23 Q Do you have knowledge in that area?

24 A I have extensive knowledge in that area.

25 Q Doctor, in addition to your training and your general

1 knowledge, are you familiar with the specific scientific
2 literature on the relationship between obesity and kidney
3 cancer?

4 A Yes.

5 Q Doctor, because of your education and training and over
6 your decades of experience with cancer research and your
7 teaching and your clinical work, are those the types of studies
8 that you regularly review and analyze and use in your work?

9 A I've been involved with kidney both from diagnostic
10 point of view, clinical point of view, as well as basic
11 research, and I'm quite familiar with a lot of the literature
12 on causation of tumors including diabetes.

13 Q In terms of toxicological information, epidemiological
14 information and other scientific studies?

15 A Yes.

16 Q Do you have experience in the design and interpretation
17 of epidemiology and other scientific studies?

18 A Yes.

19 Q Have you been a member of panels that have evaluated
20 epidemiologic methodology?

21 A Yes.

22 MR. MACE: May I approach, Your Honor?

23 THE COURT: You may.

24 BY MR. MACE:

25 Q Dr. Cohen, you've been handed Exhibit D2029. Do you

1 recognize that?

2 A Yes.

3 Q Is that one of the articles you reviewed in connection
4 with your work in this case?

5 A Yes.

6 MR. MACE: Can we bring up the first page of 2029,
7 please?

8 BY MR. MACE:

9 Q First of all, let's talk about the date of this. If we
10 could go down to the bottom. So this is from 2004, Doctor?

11 A Yes.

12 Q And let's go back up to the title. Overweight obesity
13 and cancer, epidemiological evidence and proposed mechanisms.
14 That's one of the articles you reviewed?

15 A Yes.

16 Q In terms of the authors, if we could go to the lower
17 left corner. Where would the authors -- who are they
18 affiliated with?

19 A The first author is from the American Cancer Society,
20 one of their buildings in Atlanta. The second author is from
21 the International Agency for Research on Cancer that I
22 mentioned earlier that I served on some of their panels. It's
23 two major organizations that are involved with both cancer
24 research as well as the clinical aspects.

25 Q Let's get back to the body of it and the paragraph on

1 the bottom here.

2 It states, It has been estimated that 15 to 20 percent
3 of all cancer deaths in the United States can be attributed to
4 overweight and obesity.

5 Is that a statistic you're familiar with?

6 A Yes.

7 Q Do you agree with that statistic?

8 A For 2004, that was a reasonable estimate. Some people
9 would put it quite a bit higher than that now for 2015.

10 Q Let's good over to the summary at the top of the next
11 page. We're going to get to some of the later articles. I was
12 going to try to do them in chronologic chronology. So the
13 summary is, IARC, International Agency for Research on Cancer,
14 has determined that based on results from epidemiological
15 studies, people who are overweight or obese are at increased
16 risk of developing several cancer types including -- and it
17 lists a number -- but renal cell cancer, right?

18 A Yes.

19 Q Do you agree with that statistic?

20 A Yes.

21 Q Then on the bottom right, the bottom right paragraph, it
22 talked about the IARC working group, and their report concluded
23 avoidance of weight gain reduces the risk of developing
24 cancers. And it lists a number, but, again, kidney renal cell.
25 Do you see that?

1 A Yes.

2 Q Do you agree with that statistic?

3 A Yes.

4 MR. MACE: Let's get over to page -- with a summary
5 table. It's page dot four.

6 If you could bring up the table. Go ahead and get the
7 footnote.

8 BY MR. MACE:

9 Q So this is table one, obesity-related cancers, and it
10 lists a number of them but it includes kidney renal cell, true?

11 A Yes.

12 Q What are these columns? Relative risk with a BMI.

13 There's two different columns. Can you explain those to us?

14 A The first one is a relative risk for an individual
15 that's overweight which is considered a BMI of 25 to 30. And
16 obesity is greater than 30. That's the second column. You'll
17 notice it goes up. This is one of the pieces of evidence of
18 essentially a dose response for obesity.

19 And then the next two columns are essentially an
20 estimate of the attributable risk, or the percentage of the
21 population that of all the kidney tumors, renal cell tumors in
22 the United States, one could attribute approximately 42 percent
23 to obesity.

24 And the last column is in Europe, the EU, European
25 Union, that approximately 30 percent could be attributed to

1 obesity.

2 Q So that's referring to this down here the percentage of
3 cases attributable to overweight and obesity?

4 A Correct.

5 Q And these numbers over here, we haven't talked about,
6 the 1.5 and the 2.5. What are those?

7 A Basically, it says that for an individual that's
8 overweight, BMI of 25 to 30, that they have a one-and-a-half
9 times risk of developing kidney cancer compared to somebody who
10 is of normal weight, BMI below 25. For someone with a BMI over
11 30, that is then everyone over 30, so 30 onto whatever the
12 highest number is, it's two-and-a-half times risk compared to
13 the non-overweight.

14 Q All right. And underneath the table in the right-hand
15 column, the first full paragraph, it says, Studies of
16 populations worldwide have revealed that the risk of kidney
17 cancer, specifically renal cell cancer, is 1.5 to 3 times
18 higher in overweight and obese individuals than in men and
19 women of normal weight.

20 Is that a statistic you're familiar with?

21 A Yes.

22 Q Do you agree with that?

23 A Yes. Again, I think it's important to keep in mind that
24 the 3 refers to obesity, which would be anyone over a BMI of 3.
25 There are other studies that show that the higher the obesity,

1 the higher the overall risk is.

2 Q It says, Most studies reported a dose-response
3 relationship with increasing weight or BMI.

4 First, do you agree with that?

5 A Yes.

6 Q What is the significance of that?

7 A That's what I was just saying. Basically, the higher
8 the BMI over 30, the greater the risk of developing kidney
9 cancer. So it gives you a very nice dose response that says
10 the higher your BMI, the higher your risk of developing kidney
11 cancer.

12 Q Then it says in several studies, The increase in risk
13 with increasing BMI was greater in woman than in men.

14 A What's that talking about?

15 A Basically, some studies have found that the overall risk
16 as you increase BMI is greater in women than in men.

17 MR. MACE: May I approach, Your Honor?

18 THE COURT: You may.

19 BY MR. MACE:

20 Q Doctor, we've handed you Exhibit D2032. Do you
21 recognize that?

22 A Yes.

23 Q Is that one of the studies you analyzed in connection
24 with your work in this case?

25 A Yes.

1 Q Do you consider that an authoritative article?

2 A Yes. This was a very large study that was done in
3 Europe involving nearly 350,000 people.

4 Q I think I neglected to ask you. Doctor, the article we
5 were just looking at, do you consider that one an authoritative
6 article?

7 A Yes. It's a review article. This is a primary article.

8 Q Let's bring the first page of that up. And again, let's
9 focus on the date of it. So this is in 2006?

10 A Yes.

11 Q And then the title, again, relates to body size and the
12 risk of renal cell carcinoma?

13 A Yes.

14 Q Let's get down to the summary in the bottom left. It
15 says, Among women, an increased risk of renal cell carcinoma
16 was conferred by body weight, relative risk and highest versus
17 lowest quintile, 2.13, 95 percent confidence interval.

18 Can you translate that for us?

19 A What that says is the highest group of BMI compared to
20 the lowest BMI had essentially a twofold risk of developing
21 renal cell cancer. Confidence interval is just basically the
22 statistical analysis where 95 percent of the cases would have
23 fallen in the range stated there, 1.16 to 3.9. So
24 statistically they can't sort out whether that was 1.16 or 3.9
25 times the risk. The average was 2.13.

Vol. 12 - 163

1 Q There is a statement in the next column I wanted to ask
2 you about, over here.

3 Recent data suggests that the increasing prevalence of
4 obesity may at least partially be responsible for rising rates
5 of renal cell kidney cancer.

6 Now, in your review of Dr. Bahnson's trial testimony,
7 did you see his comments on the incidence, the rate of increase
8 or leveling off or decrease of kidney cancer and obesity? Did
9 you see his comments on that?

10 A Yes.

11 Q Did you agree with his comments on that?

12 A No. I think he, one, factually was incorrect, but his
13 interpretation of the data was quite a ways off the mark.

14 Q Let's take those one at a time. In terms of factually,
15 what do you believe the facts to be?

16 A In the United States, the incidence of renal cell
17 carcinoma has been increasing until about the last five or six
18 years, and then it's stabilized at that point.

19 He indicated that it had actually decreased over the
20 last few years. In reality, what's decreased is the death rate
21 of renal cell carcinoma, and that's primarily due to the fact
22 that we just have better treatments now so people are living
23 longer.

24 Q Catching it earlier and treating people?

25 A And even those caught later were having more success in

1 prolonging life.

2 Q So you had a factual dispute. And then you said the
3 interpretation you disagreed with. Tell us about that.

4 A He was saying this would be evidence against obesity
5 being related to renal cell carcinoma because the obesity has
6 continued to increase so that the incidence of renal cell
7 carcinoma should continue to increase.

8 There's two factors that counter that. One is that much
9 of the increase that happened during the '90s and early 2000s
10 were due to incidental cancers that were picked up like
11 Mrs. Bartlett's where she went in for some other complaint and
12 they did imaging studies of the abdomen and found a kidney
13 tumor. In her instance, she was in there for gallbladder
14 disease and they found a kidney tumor. So there's what is
15 called a blip there.

16 The other important part here - and he ignored
17 completely - was the other major cause of kidney cancer is
18 cigarette smoking. And cigarette smoking incidence has been on
19 the decline over the last 30, 40 years or so, certainly amongst
20 men and now even amongst women. So that would have led to a
21 decrease in kidney cancer. So the blending of all of these
22 factors I think is why we're seeing a stabilization now of the
23 kidney cancer rate.

24 Q Because one of the other contributing factors has gone
25 down?

1 A Basically -- obesity has gone up, cigarette smoking has
2 been going down.

3 Q All right. Let's look over at page dot four, so page
4 731 of the article. But in the upper right-hand corner you'll
5 see 2032.4. I wanted to focus you on the results down here.

6 Now, in terms of these studies and how much weight you
7 give the studies, does the size of the study have any impact on
8 that?

9 A Yes.

10 Q And how does that come into play?

11 A Well, the larger number of population that's being
12 followed, the better the statistical analysis will be. It
13 gives you a larger pool and there's less chance that the
14 results will happen by chance.

15 Q And in terms of the participants here, there were how
16 many?

17 A 348,550.

18 Q Is that big or small? What is that?

19 A That's a huge study.

20 Q Let's go in the next column briefly. It says, Among
21 women, body weight and BMI were positively related to risk of
22 renal cell carcinoma, and woman in the highest versus the
23 lowest quintile of body weight had a twofold increase risk
24 after multivariable adjustment.

25 Can you interpret that for us?

1 A Essentially, when you take into account all of the risk
2 factors -- so they took into account cigarette smoking,
3 hypertension, a few other things. When they filter all of that
4 out, there is attributed to obesity itself about a twofold
5 increase in overall risk.

6 Q Let's go back, Doctor, to page 3032.7, underneath the
7 table is a paragraph.

8 It says, In these analyses, obese women had a 1.68-fold
9 increased risk of RCC, renal cell carcinoma, compared to
10 non-overweight women.

11 Is that a statistic you're familiar with?

12 A Yes.

13 Q Do you agree with that statistic?

14 A Yes.

15 Q Doctor, we're not going to go through them all, but
16 approximately how many papers did you look at that have
17 analyzed the relationship between obesity and renal cell kidney
18 cancer?

19 A There were at least 20, some of which were reviews and
20 some of which were primary studies.

21 Q And again, we're not going to go through all of them. I
22 just want to do a couple. I want to go to a plaintiff's
23 exhibit.

24 MR. MACE: Can I approach, Your Honor?

25 THE COURT: You may.

1 BY MR. MACE:

2 Q Sir, do you have the exhibit that's been marked P1-6672?

3 A Yes.

4 Q Are you familiar with that article?

5 A Yes.

6 Q Do you consider it authoritative?

7 A Yes.

8 MR. MACE: Can we bring up P1-6672? Let's start with
9 the date again. I guess down at the bottom.

10 BY MR. MACE:

11 Q So we're now into 2008, sir?

12 A Yes.

13 Q And it's the *Lancet*. What is the *Lancet*?

14 A The *Lancet* is a medical journal published out of
15 England. It's comparable to our *Journal of American Medical*
16 *Association* here in the United States.

17 Q Is it fair to say that's one of the leading medical
18 journals?

19 A It's one of the more popular medical journals.

20 Q Let's go back up to the title, please. This one is,
21 *Body mass index and incidence of cancer, systemic review and*
22 *meta-analysis of prospective observational studies*.

23 Do these people get paid by how many letters they use in
24 their words?

25 A This would actually be considered a short title.

1 Q In any event, body mass index. I think most of us are
2 familiar, but just so we're clear, what does that refer to?

3 A The index which is a reflection of your weight. It's a
4 ratio of your weight to height.

5 Q And then meta-analysis, again, what is that?

6 A That's a statistical review of several studies that
7 you've pooled all the population together to try to give a
8 larger sample size.

9 Q Let's bring up the findings box. In terms of study
10 size, we analyzed 221 datasets, 141 articles, including 282,137
11 incident cases.

12 That's the number of different people they looked at?

13 A That's the number of actually cases of tumors they were
14 able to identify.

15 Q Again, is that a small number or a big number?

16 A Enormous.

17 Q Below that it talks about, in women we recorded strong
18 associations between a five kilogram per meter squared increase
19 in BMI. It goes on with a number of cancers but renal is
20 included there, right?

21 A Yes.

22 Q What is that saying to us?

23 A Basically, what they're saying here is that every
24 increase of five BMI points, that the incidence rises by 1.34
25 times.

1 Q Let's go to the bottom of the page. And if we could
2 bring up the text, the bottom third of the page. It says, In
3 2007, the World Cancer Research Fund used a more standardized
4 approach to review the evidence. This report concluded that
5 the evidence that body fatness is associated with increased
6 risk of -- and it goes on with cancers, but it includes the
7 kidney is convincing.

8 Do you agree with that statement?

9 A Yes.

10 Q Let's go over, sir, there's some tables and some text
11 next to it. I want to turn you over to, please, dot four.

12 MR. MACE: If we could enlarge, please, the paragraph
13 at the bottom.

14 BY MR. MACE:

15 Q In women, a five kilogram per meter squared increase in
16 BMI was strongly associated with renal cancer. Again, do you
17 agree with that statement?

18 A Yes.

19 MR. MACE: May I approach, Your Honor?

20 THE COURT: You may.

21 BY MR. MACE:

22 Q Doctor, I'm handing you -- it's being handed to you --
23 an article I guess we'll marked for identification as D2457.
24 Are you familiar with that article?

25 A Yes.

Vol. 12 - 170

1 Q Is that something you've analyzed for purposes of your
2 work in this case?

3 A Yes.

4 Q And do you consider that an authoritative article?

5 A Yes.

6 MR. MACE: Let's bring up the first page of that.

7 MR. DOUGLAS: This is D2457?

8 MR. MACE: Yes. We've labeled it 2457.

9 Could we have the ELMO, please?

10 BY MR. MACE:

11 Q Doctor, now we're up to 2010?

12 A Yes.

13 Q And the title is, *Body mass index and cancer risk, evidence for causal association*, right?

14 A Yes.

15 Q There's some reference here that they're testing the
16 data against the Bradford-Hill criteria of causal association.
17 Do you have an understanding of what Bradford-Hill is referring
18 to?

19 A Yes.

20 Q What is that referring to?

21 A Bradford-Hill was a scientist that came up with some
22 criteria to evaluate causality now more than 50 years ago, and
23 it's still used today for evaluation of scientific evidence
24 supporting causation.

1 Q They say that they tested the data against the
2 Bradford-Hill criteria of causal association and argue that the
3 available data support strength of association, consistency,
4 specificity, temporality, biological gradient, plausibility,
5 coherence and probably analogy.

6 What is that referring to?

7 A Those are the criteria that were set forth by
8 Bradford-Hill, again, more than 50 years ago.

9 Q This is 2010. We conclude there is considerable
10 evidence to support a causal association between BMI and risk
11 for many cancer types. Then they go on.

12 Do you agree with that statement?

13 A Yes.

14 Q And in the introduction part, if we could -- they say
15 that increased body mass index as an approximation for body --
16 is that adiposity?

17 A Yes.

18 Q Is an established risk factor for developing adult
19 malignancies. First of all, do you agree with that?

20 A Yes.

21 Q What is adiposity?

22 A Adiposity is fat tissue.

23 Q Let's look at one more, Doctor.

24 MR. MACE: May I approach, Your Honor?

25 THE COURT: You may.

1 BY MR. MACE:

2 Q Doctor, do you have Exhibit D1492?

3 A Yes.

4 Q Is that one of the articles you've reviewed and analyzed
5 in coming to your opinions in this case?

6 A Yes.

7 Q Do you consider it authoritative?

8 A Yes.

9 Q Let's bring that up and start at the bottom --

10 MR. MACE: I guess we need to switch over. If we
11 could bring up the date at the bottom.

12 BY MR. MACE:

13 Q So we're May of 2010 now. Is that when this was put
14 out?

15 A Yes.

16 Q And let's bring up the entire summary box at the top.

17 So this is called epidemiology and risk factors for
18 kidney cancer. And lead author is Chow?

19 A Yes.

20 Q It makes a reference here to the changing prevalence of
21 known risk factors for renal cell cancer including cigarette
22 smoking, obesity, and hypertension is likely to affect
23 incidence trends. Does that relate to what you were telling us
24 earlier?

25 A Yes.

1 Q In terms of these factors -- let's look over at the key
2 points box on the next page. If you could pull up the key
3 points.

4 Article states, Cigarette smoking, obesity, and
5 hypertension are well-established risk factors for renal cell
6 kidney cancer.

7 Do you agree with that statement?

8 A Yes.

9 Q Did you read Dr. Bahnsen's testimony that he did not
10 think any of those were risk factors?

11 A I read that, yes. He actually used this reference also,
12 which surprised me.

13 Q He used this reference as one of his references, but his
14 conclusion is they're wrong, they're not risk factors?

15 A That's what he stated.

16 Q Let's look over at the table on risk factors, table
17 three in this article he cited. So it would be over at -- let
18 me look. My page doesn't have the number.

19 MR. MACE: I guess it's dot six, please. If you could
20 blow up that table, including the footnote.

21 BY MR. MACE:

22 Q So it's table three, risk factors for renal cell
23 carcinoma. Do you see that?

24 A Yes.

25 Q It breaks them up into established and suspected, right?

1 A Yes.

2 Q And established risk factors include the cigarette
3 smoking, excess body weight and hypertension, right?

4 A Yes.

5 Q Also, I guess, family cancer syndromes, right?

6 A Yes.

7 Q And in terms of the established, it's got this little
8 asterisk. If you go down and look at what that means, Observed
9 in nearly all scientific study, exposure precedes renal cell
10 cancer, dose-response relationships, risk reductions with
11 removal of exposure. Are those factors you consider in terms
12 of whether or not it's causal or not?

13 A Yes.

14 Q Let's look at the renal cell carcinoma box lower in the
15 page to the right. So it talks about cigarette smoking being
16 an established risk factor for both tumor types, and then
17 predisposing conditions including obesity and hypertension are
18 known to increase the risk of renal cell cancer development,
19 right?

20 A Yes.

21 Q Over on obesity, let's look at that page. Over one page
22 at the top right, it's got a specific statement on obesity.

23 Excess body weight was estimated to have a role in the
24 development of more than 40 percent of renal cell cancer cases
25 in the U.S.

1 Do you agree with that statistic?

2 A Yes.

3 Q And then it talks about, Prospective studies worldwide
4 found individuals who were overweight or obese at baseline had
5 an increased risk of subsequent renal cell cancer in a
6 dose-response manner. What's that talking about?

7 A I think there are several aspects of the sentence that
8 are important. One is they're prospective studies, not
9 retrospective, so it eliminates the issue of recall bias. It's
10 looking forward and following patients for development of
11 cancer.

12 Secondly, it's including individuals that are overweight
13 and obese. So it's a BMI of 25 and greater, and putting them
14 all together in a category. And even with that for renal cell
15 carcinoma, that 34 percent of the cases in women -- I'm sorry,
16 that there is a dose-response increase for each five BMI units,
17 kilogram per meter squared, that for each of those for women it
18 increases by 34 percent.

19 Q All right. And for somebody like Mrs. Bartlett, what
20 was her BMI?

21 A Her BMI was, at the time of diagnosis, just over 40. So
22 it would be three of these five kilogram per meter squared
23 units.

24 Q So in terms of a percent risk increase?

25 A It would be up by 102 percent more. So more than double

1 compared to the baseline.

2 Q There is a statement below that in the next paragraph.
3 If we could go down a little further.

4 The global rise in obesity is likely to have contributed
5 to the increase in renal cell carcinoma incidence.

6 Does that relate to what you were talking about earlier?

7 A Yes.

8 Q Did you also, sir, review some of the materials that we
9 reviewed with Dr. Bahnsen during his testimony at court?

10 A Yes.

11 Q And, for example, the American Cancer Society, do you
12 view their publications on cancer generally to be
13 authoritative?

14 A They're good reference, especially on incidence and
15 causation.

16 MR. MACE: May I approach, Your Honor?

17 THE COURT: You may.

18 BY MR. MACE:

19 Q I'm going to label this as D2458. Doctor, are you
20 familiar with this review?

21 A Yes.

22 Q Do you consider it to be authoritative?

23 A Yes.

24 MR. MACE: Can we bring up the first page of that,
25 please?

1 BY MR. MACE:

2 Q Again, I don't want to dwell too much on this. Let's go
3 to page one, basic cancer facts, and can cancer be prevented.

4 It talks about the World Cancer Research Fund estimating
5 that up to one-third of the cancer cases that occur in
6 economically developed countries like the U.S. are related to
7 overweight or obesity, physical inactivity, and/or poor
8 nutrition, and thus could be prevented.

9 Are you familiar with that research?

10 A Yes.

11 Q Do you agree with it?

12 A Yes.

13 Q Let's look over specifically at kidney cancer, which is
14 page 13 of the document. It's going to have a different --
15 page 13 on the bottom right corner. Let's bring up that kidney
16 cancer.

17 So, again, it's talking about now we're up to 2015 and
18 it's talking about an estimated more than 61,000 new cases of
19 kidney renal cancer expected to be diagnosed in 2015. Do you
20 see that?

21 A Yes.

22 Q That's what you were referring to that statistics are
23 going up?

24 A Yes.

25 Q Risk factors. Tobacco smoking is a strong risk factor

1 for kidney cancer. Additional risk factors include obesity
2 which causes an estimated 30 percent of cases, and it lists
3 some other things.

4 Are you familiar with these statistics?

5 A Yes.

6 Q Is that in the same ballpark that you believe is
7 accurate?

8 A Yes.

9 Q Finally, on this topic, you saw that Dr. Bahnsen
10 referred to some textbooks?

11 A Yes.

12 Q Campbell-Walsh Urology. Are you familiar with that
13 text?

14 A Yes. That's the standard textbook for urologists.

15 Q Four volumes of this, right?

16 A It's a very heavy set of documents. I think it costs
17 over a thousand dollars.

18 Q Do you consider that authoritative?

19 A Yes.

20 MR. MACE: Do we have page 1421 of that?

21 BY MR. MACE:

22 Q Again, in terms of the established -- so this is renal
23 tumors, established, and etiology. You said that's causation.

24 A Yes.

25 Q Tobacco exposure, obesity, hypertension and putative,

1 and it has some other things listed, right?

2 A Correct.

3 Q Trichlorethylene, occupational exposure, radiation
4 therapy, dietary and other things, right?

5 A Yes.

6 Q It's got etiology below that. And again, you said
7 that's causation, right?

8 A Correct.

9 Q The most generally accepted environmental risk factor
10 for renal cell cancer is tobacco exposure, and talks about the
11 relative associated risks being modest.

12 And let's go to the next page. Bring up the obesity
13 section.

14 Obesity is now accepted as another major risk factor for
15 renal cell cancer of an increased relative risk of 1.07 for
16 each unit of rising body mass index, right?

17 A Correct.

18 Q And it cites some of the articles we've already talked
19 about, right?

20 A Yes.

21 Q Increased prevalence of obesity likely contributes to
22 increase incidence of renal cell cancer in Western countries.
23 It's been estimated that more than 40 percent of cases of renal
24 cell cancer in the United States may be causally linked to
25 obesity. Do you agree with that statistic?

1 A Yes.

2 Q And finally the other text that Dr. Bahnsen mentioned,
3 Adult and Pediatric Urology. Are you familiar with that text?

4 A Yes.

5 Q Do you consider that authoritative?

6 A Yes.

7 MR. MACE: If we could go to page 614, please. Let's
8 bring up the table in that paragraph.

9 BY MR. MACE:

10 Q Table 6.2, risk factors associated with renal cell
11 carcinoma, it includes cigarette smoking, hypertension,
12 elevated body weight, medications and some other things, right?

13 A Yes.

14 Q Including genetic predisposition, right?

15 A Correct.

16 Q Etiology, causation. Based on information from case
17 controlled genetic and cohort studies, several risk factors
18 have been associated with the development of renal cell cancer.
19 Most studies with sufficient sample size demonstrate a positive
20 correlation between renal cell cancer and smoking cigarettes
21 associated with up to 35 percent increase in risk.

22 Obesity also has shown positive association with renal
23 cell cancer. Greater risks exist with women with elevated
24 weight than for male counterparts, right?

25 A Yes.

1 Q Do you agree with those statistics?

2 A Yes.

3 Q Doctor, do you have an opinion to a reasonable degree of
4 medical certainty as to whether obesity is a causative risk
5 factor for the development of kidney cancer in general?

6 A I do.

7 Q What is your opinion?

8 A I strongly believe that it is a major cause of renal
9 cell carcinoma in the United States.

10 Q Do you believe that obesity, as a causative factor for
11 the development of kidney cancer, is well established in the
12 literature?

13 A Yes.

14 Q And do you believe that it satisfies the Bradford-Hill
15 criteria?

16 A It does.

17 Q With regard to Dr. Bahnsen's testimony that obesity is
18 not even a risk factor, do you agree or disagree with that?

19 A I strongly disagree with that statement.

20 Q With regard to his statement that hypertension and
21 smoking are not risk factors for kidney cancer, do you agree or
22 disagree?

23 A I also disagree with that.

24 Q Did you see Dr. Bahnsen's testimony that prior to coming
25 to his opinions in this case he did not specifically pull out

Vol. 12 - 182

1 and analyze the literature on the relationship between obesity
2 and kidney cancer?

3 A I did see that statement, which surprised me considering
4 that he was countering all the published literature.

5 Q Do you think that's a reliable way to come to opinions
6 on the relationship between obesity and kidney cancer?

7 MR. DOUGLAS: I object. It misstates the testimony.

8 THE COURT: You can cover that on cross. We have the
9 instruction as well. I'm waiting for you to ask me when to
10 give it, then we'll continue.

11 MR. DOUGLAS: This would be a good time for the
12 instruction.

13 THE COURT: When you're finished with this topic, let
14 me know and then I'll give it.

15 BY MR. MACE:

16 Q Doctor, do you think that's a reliable way to come to
17 opinions on relationship between obesity and kidney cancer, to
18 not pull out the literature on it and study it?

19 A No.

20 MR. DOUGLAS: Objection.

21 THE COURT: Overruled.

22 BY MR. MACE:

23 Q Your answer, Doctor?

24 A No, especially if you're going counter to the prevailing
25 conclusions that are in the literature. You need to have a

1 thorough review and come to a clear understanding of why you're
2 disagreeing with everyone else.

3 MR. MACE: I'm shifting a little bit on topic, Your
4 Honor.

5 THE COURT: Ladies and gentlemen, I'm going to give
6 you another instruction here.

7 You've just heard some evidence relating to an alleged
8 relationship between obesity and kidney cancer, but you need to
9 understand that no expert or other witness in this case is
10 actually offering any medical opinion that obesity, and not
11 C-8, was the specific cause of Mrs. Bartlett's kidney cancer.
12 Mrs. Bartlett has offered medical opinion testimony that her
13 kidney cancer was caused by C-8 in her drinking water. Any
14 evidence relating to obesity as the potential cause of her
15 kidney cancer may be considered only as an attempt to discredit
16 the evidence supporting her claim that C-8 caused her kidney
17 cancer.

18 With that, you may continue.

19 BY MR. MACE:

20 Q Dr. Cohen, are you aware that Dr. Bahnsen listed a
21 number of competing causes for kidney cancer and then evaluated
22 the competing causes?

23 A Yes.

24 Q And are there important factors that need to be
25 considered when you're doing that type of weighing between

1 competing risk factors?

2 A Yes.

3 Q Let's use an example, Dr. Cohen. Let's say,
4 hypothetically, that instead of kidney cancer, this case was
5 about what caused somebody's lung cancer. Are you with me on
6 the hypothetical?

7 A Yes.

8 Q Let's say that person, this hypothetical person, had
9 been exposed to both chest radiation on one hand, and tobacco
10 smoke on the other hand. What type of factors would be
11 important to consider when you're trying to evaluate the most
12 likely cause of the lung cancer?

13 A For both the causes, you would have to know something
14 about the amount that they were exposed to and for how long.
15 With regard to radiation, you'd have to be specific as to the
16 type of radiation that was involved.

17 Q Now, in terms of the amount of exposure with regard to
18 the smoking, are you familiar with the concept of pack years?

19 A Yes.

20 Q And, in your opinion, sir, before we get there, are both
21 smoking on the one hand, and radiation on the other hand,
22 capable of causing, capable of causing lung cancer?

23 A Yes.

24 Q So despite the fact that radiation and smoking are both
25 capable of causing the lung cancer, can you come to a reliable

Vol. 12 - 185

1 opinion as to whether one was, in fact, a likely cause of the
2 specific person's lung cancer without an evaluation of the
3 relative dose?

4 A No. You have to know the dose and duration.

5 Q Dr. Cohen, have you also reviewed Dr. Bahnson's
6 background and training?

7 A Yes.

8 Q And are there differences between his background and
9 training and your background and training, as it relates to the
10 specific issues in this case?

11 A Yes.

12 Q What are some of those differences?

13 A Dr. Bahnson is a urologist, and he's been trained in the
14 surgical aspects of urology, particularly the treatment of
15 cancer in the various urological organs, which would be kidney,
16 bladder, testes, adrenal. His research has been focused on
17 various clinical aspects of these diseases, also looking for
18 biomarkers. He has not had any training nor has he published
19 on causation or evaluation of that.

20 My background is involved with diagnosis and prognosis
21 as a pathologist. I actually served on the bladder panel with
22 Dr. Bahnson with the NCCN, which is the National Comprehensive
23 Cancer Network system for the bladder, where we came up with
24 guidelines for the diagnosis and management of patients with
25 bladder cancer.

1 But I've also been trained, with my Ph.D. and then with
2 all my research, on specific aspects of causation with regard
3 to what kinds of chemicals and other agents can cause cancer
4 and mechanisms by which they act.

5 Q Doctor, do you have specific experience with
6 investigations concerning animal carcinogenesis?

7 A Yes.

8 Q Do you have specific experience with investigations
9 concerning human cancer epidemiology?

10 A Yes.

11 Q Do you believe that the differences between some of your
12 training and experience versus Dr. Bahnsen's are significant in
13 terms of the specific issues involved in this case?

14 A Yes.

15 Q How so?

16 A I think that, as I said, he has not had any training in
17 causality, and that's reflected in both his report as well as
18 his testimony and cursory aspect of his overall evaluation,
19 whereas, I've been involved with the causation and especially
20 the issue of extrapolation of animal findings to humans. I've
21 been on the WHO panel that's involved with this beginning in --
22 I think we started in 1996 developing a framework on how you
23 analyze the animal data and how you then extrapolate those
24 findings to the human.

25 Q Doctor, did you review Dr. Bahnsen's report in his

1 testimony regarding C-8?

2 A Yes.

3 Q And did that include a transcript from Dr. Bahnsen's
4 trial testimony?

5 A Yes.

6 Q Did you see Dr. Bahnsen's statement that it is important
7 to consider dose when evaluating specific causation in an
8 individual?

9 A Yes.

10 Q Do you agree with that statement, that it's important to
11 consider dose when evaluating specific causation in an
12 individual?

13 A Yes, that's the fundamental principle of toxicology.

14 Q We talked about this hypothetical and the tobacco and
15 the number of pack years. Do you have an opinion, sir, as to
16 whether Dr. Bahnsen appropriately considered relative dose,
17 this pack-years-type concept, when weighing the potential that
18 Mrs. Bartlett's kidney cancer was caused by obesity or weighing
19 the possibility that it was due to C-8?

20 A It didn't seem --

21 MR. DOUGLAS: Objection, Your Honor.

22 THE COURT: I'll see you at side-bar. You say stand
23 if you wish, ladies and gentlemen.

24

25

1

- - -

2

Thereupon, the following proceeding was held at side-bar
out of hearing of the jury:

4

THE COURT: What we all know has been ruled out is
this doctor's use of a differential diagnosis. What I
understood the question to be asking is whether Dr. Bahnsen's
use of differential diagnosis was medically sound. Is that
what you see is the question?

9

MR. MACE: In a nutshell. This is right in accord
with your ruling on evidentiary motions.

11

THE COURT: You're assuming one thing, though, that
I'm going to be consistent.

13

MR. MACE: You were pretty close through three orders.

14

THE COURT: For the record, I'd say I was a hundred
percent close. There's no margin of error.

16

MR. MACE: Yes, sir. Stipulated.

17

DuPont can present a witness to create a triable issue
by attempting to disprove the reliability of testimony on
specific causation.

20

THE COURT: I'm with you on that. I agree with that.
Now the question is, is there any reason why this goes beyond
that?

23

MR. DOUGLAS: I just want to read -- let me preference
it by saying I'm concerned about the part of the Court's order
that said DuPont is cautioned that Dr. Cohen may not utilize

1 his impeachment opinion as a back door to state his opinions
2 related to general or specific causation.

3 MR. BILOTT: That's precisely what this is. They were
4 attempting to present to the jury the fact that -- this is
5 exactly what we talked about before. They're going to say
6 Dr. Bahnsen -- they're going to get this witness to say
7 Dr. Bahnsen didn't properly consider dose, which is something
8 the science panel did not do. To suggest through this
9 hypothetical --

10 THE COURT: Let me get an instruction on this.

11 This reminds me of the tobacco case. You can't use dose
12 in the tobacco case to say you didn't have high enough dose to
13 get lung cancer. That can't be said here as long as she
14 doesn't meet the .05 parts per billion. It can be used when
15 you're weighing competing etiology.

16 MR. BILOTT: Our concern in this particular case, the
17 science panel didn't calculate what the specific doses were.

18 THE COURT: I'll give you an instruction on that. I
19 do think, like in smoking cases, whether you smoke 30 years or
20 five years, it's something the jurors can consider in deciding
21 which is the more probable cause.

22 MR. MACE: That's the limited use I'm trying to make.

23 THE COURT: With that instruction, would you be
24 satisfied with that? Not satisfied, but be happier than you
25 would be without the instruction.

1 MR. BILOTT: We understand, Your Honor.

2 (Back in open court.)

3 THE COURT: If you want to reask the question, you
4 may. And after the answer, I'll give the instruction we talked
5 about.

6 BY MR. MACE:

7 Q To set the stage, we talked about a hypothetical, not
8 this case but a different case, and we talked about if this
9 case was about lung cancer and pack years. And I was trying to
10 bring it back to Dr. Bahnsen's testimony. My question to you
11 was: Do you have an opinion as to whether Dr. Bahnsen
12 appropriately considered relative dose, that pack-years-type
13 concept, when weighing the potential that Mrs. Bartlett's
14 kidney cancer was caused by obesity, or in weighing the
15 possibility it was due to C-8?

16 This first question was do you have an opinion?

17 A Yes.

18 Q And let's start with the obesity, first.

19 Do you have an opinion to a reasonable degree of medical
20 certainty as to whether Dr. Bahnsen appropriately considered
21 the level of obesity, the pack years to put it into a different
22 context, the pack years of obesity, or level of obesity in
23 weighing the potential that Mrs. Bartlett's kidney cancer was
24 caused by obesity?

25 A He completely dismissed obesity as a risk factor, so he

1 couldn't put it into perspective of quantitatively since he
2 dismissed it qualitatively.

3 Q In terms of the literature, some of which we reviewed,
4 but you said approximately 20 articles out there, several of
5 these cited by Dr. Bahnson, what does the scientific literature
6 in your opinion tell us about the relative risk for getting
7 kidney cancer from obesity if you're morbidly obese, if you
8 have the level of obesity we're talking about here?

9 A I think as you saw in the articles we reviewed, all of
10 them talk about a dose response. And nearly all the studies
11 that have looked at obesity and renal cell carcinoma, they've
12 shown a dose response which means the heavier you are, the
13 higher your BMI, the rate of your risk of developing kidney
14 cancer.

15 For the morbidly obese, some of them come up with
16 estimates that are fivefold higher than somebody who is normal
17 weight, or even higher. That would be the high end of the
18 risks. So going back to your cigarette analogy, that would be
19 your three pack a year for 40 years kind of exposure.

20 Q Okay. As opposed to a pack a day or a pack --

21 A Compared to a cigarette a day.

22 Q Okay. So similarly, when applying this pack-year
23 concept to Mrs. Bartlett's exposure to C-8, did you feel that
24 Dr. Bahnson adequately evaluated that?

25 A I felt that he did not evaluate quantitatively. He just

Vol. 12 - 192

1 basically put together all of that, even though he stated that
2 dose was an important consideration.

3 Q Now, the jury has heard a little bit, Doctor, about
4 water levels, the level of C-8 in water, drinking water, and
5 level of C-8 in the blood. In your expert opinion, is one a
6 better measurement of a particular individual's dose than the
7 other?

8 A Blood levels are generally considered a better
9 assessment of the exposure compared to water levels, because
10 blood levels would reflect what that individual's body has done
11 with the substance once it's gotten their exposure into it. So
12 generally, blood levels are considered a much better exposure.
13 So, for example, in pharmaceutical industry, the FDA only
14 accepts blood levels. They don't say what's the daily dose or
15 something, how much is in a pill. It's what's the blood level.

16 Q So there is individual variation among people?

17 A Quite a large variation.

18 Q And you and I, for example, could be exposed to the
19 exact same amount in the air, but we could end up with
20 different amounts in our blood?

21 A Exactly.

22 Q Do you recall from reading Dr. Bahnsen's second
23 transcript of his deposition -- so after he had rendered his
24 opinions, and then he was deposed as an expert -- that he did
25 not know at that time even what Mrs. Bartlett's blood level

1 was?

2 A I do not believe he knew at that time, or at least he
3 didn't state that he was aware.

4 Q Did you read the part of his trial testimony where he
5 acknowledged that she had about a 19.5 part per billion of C-8
6 in her blood when it was tested in 2005?

7 A Yes.

8 Q Did you see his acknowledgment that the mean level for
9 all of the community members that were tested in 2005 was
10 approximately 82 parts per billion?

11 A Yes; for women, yes.

12 Q And then for the people drinking the Tupper Plains
13 water, that the mean was approximately 39 parts per billion?

14 A Correct.

15 Q But did you see any of this weighing of the pack years
16 in Dr. Bahnsen's, either in his report or his opinion and
17 testimony at deposition or at trial?

18 A No.

19 Q I'm going to keep moving.

20 MR. DOUGLAS: Your Honor, I ask for the instruction.

21 THE COURT: Ladies and gentlemen, I'm going to try and
22 thread the needle again here with you. Let's use a comparison
23 to a cigarette smoking case where someone has developed lung
24 cancer and the issue would be was it caused by smoking or was
25 it caused by something else? And the jury would have to decide

1 which of the causes was the one that essentially caused the
2 lung cancer. The law has concluded that lung cancer can be
3 caused by smoking. It doesn't mean it always is the cause.
4 But that's not something any scientist would deny at this
5 point.

6 The place that dosage comes in, in other words, how many
7 cigarettes did you smoke comes in, is not to show that someone
8 didn't smoke and the lung cancer wasn't connected to the
9 smoking, but it goes to the issue of is it more likely that
10 smoking caused the lung cancer compared to something else.
11 That's what we're getting into here.

12 You've seen the standard that we've talked about, the
13 .05 parts per billion. I know you all know it by heart. The
14 doctor's testimony is not challenging that. But the dosage,
15 the quantity in the water and the length of time may have
16 something to tell you about how you decide what caused the
17 kidney cancer.

18 It doesn't undercut the .05 parts per billion. I'm sure
19 you understand that. So with that, you may continue.

20 BY MR. MACE:

21 Q Dr. Cohen, as part of your work in this case, did we ask
22 you to look at the various risk factors that Dr. Bahnsen had
23 listed in reaching opinions in terms of the thoroughness of his
24 investigation of those various factors?

25 A Yes.

Vol. 12 - 195

1 Q I'm going to talk to you about a couple, but let's bring
2 up his list of risk factors for kidney cancer.

3 I guess, let's just start with the first one there,
4 Doctor. Family history. Is it your opinion, Doctor, did
5 Dr. Bahnson do a thorough investigation of that factor?

6 A He did an investigation but it was quite limited and
7 certainly wouldn't be considered a thorough investigation.

8 Q And why do you say that?

9 A A couple of things. One is that he didn't -- other than
10 I believe parents and siblings, he didn't go beyond that, as
11 far as looking for possible causes. But also he didn't follow
12 it in greater breadth with other family members and other
13 generations, particularly in an individual like Mrs. Bartlett
14 who developed a cancer at a relatively young age. I believe
15 she was 40 or 41 at the time of diagnosis. Generally, that's a
16 figure you should explore in greater depth in family history.

17 Q So, if this is Mrs. Bartlett and her mom and dad and
18 their moms and dads, you saw that he had some information on
19 her dad?

20 A Correct.

21 Q Did you see any investigation of the rest of the family
22 tree?

23 A No, I did not. And also with regard to the dad, it was
24 strictly for him, the evaluation of the kidney cancer that he
25 had, although his was a different type than the one that

1 Mrs. Bartlett had.

2 Q Let's be clear on that. You're not claiming that her
3 father, Mr. Clem -- you're not claiming that he had renal cell
4 kidney cancer?

5 A No. But I think it's important to note he had four
6 different types of cancer, and that should also bring up a
7 greater concern for a family connection for just cancer risk
8 overall.

9 MR. DOUGLAS: Your Honor, may we approach?

10 THE COURT: You may stand if you wish, ladies and
11 gentlemen. I'll see you at side-bar, Counsel.

12 - - -

13 Thereupon, the following proceeding was held at side-bar
14 out of hearing of the jury:

15 MR. DOUGLAS: I hate to be a nag, Judge, but this
16 opinion is -- he's clearly said that he is -- he is suggesting
17 that family history may have played a role. He just said that
18 all these different cancers that the father had should be of
19 concern, and that it's clearly -- this is just coming that
20 close to just stating an opinion.

21 Secondly, he testified that -- he wrote in his report
22 and testified at his deposition that family history played no
23 role. So to suggest right now is completely disingenuous.

24 THE COURT: Isn't that cross-examination? Why
25 wouldn't that be sufficient?

1 MR. DOUGLAS: He's been precluded on specific
2 causation. I'm not going to open that door.

3 THE COURT: Do you mind if I kid you, that's kind of a
4 New York thing?

5 MR. DOUGLAS: We use our hands.

6 MR. BILOTT: There was a motion in limine on the
7 family history issue.

8 MR. MACE: You'll recall the resolution of the -- the
9 erroneous of the other doctor's investigation. That's all he's
10 talking about, the erroneous --

11 THE COURT: I'm sure if he said it's so, it's so. But
12 that's cross-examination.

13 MR. DOUGLAS: I don't think this is something I can
14 cross-examine on because that would open the door to his
15 specific causation.

16 THE COURT: No. I mean --

17 MR. DOUGLAS: Am I permitted to say you ruled out
18 family history? If the Court is saying I am permitted to do
19 that, cross-examine, and I'm not opening the door --

20 MR. MACE: I don't believe he'll say that -- during my
21 discussions with him, he thinks family history was -- he's
22 talking about the thoroughness.

23 MR. DOUGLAS: The suggestion is right now that it was
24 of concern and, therefore, he is suggesting that -- the doctor
25 is suggesting to the jury potentially, as they go back and

1 deliberate and think about that answer, they'll think that
2 family history is part of what happened.

3 THE COURT: You can still use his testimony even
4 without the opinion. He's not going to give the differential
5 diagnosis. You can still cross him with his prior testimony.

6 MR. DOUGLAS: So I'm clear, I can ask him, don't you
7 agree that family history played no role in this case, and that
8 will not open the door for Mr. Mace to get into the rest or
9 anything else on cause specific.

10 MR. MACE: My redirect can get him -- he doesn't know
11 one way or the other and Bahnson doesn't know one way or the
12 other.

13 (Back in open court.)

14 THE COURT: You may continue, Mr. Mace.

15 BY MR. MACE:

16 Q We were about to go to the second factor, genetics. I
17 guess I'll ask you the same question, Dr. Cohen. Did Dr.
18 Bahnson do a thorough investigation, in your view, of that
19 factor?

20 A No. He mentioned some of the genes that are related and
21 some of the mechanisms by which they act, but he didn't give a
22 thorough evaluation of either aspect.

23 Q Let's get some clarification here because you may recall
24 from reading his testimony, he and I had a brief discussion
25 about the VHL gene?

1 A Yes.

2 Q Can you explain to us -- first of all, do you have
3 familiarity with that based on your decades of experience in
4 cancer research?

5 A Yes. I'm very familiar with the VHL gene.

6 Q In terms of kidney cancer and the VHL gene, could you
7 describe to us why that can be significant?

8 A It was discovered that people with the so-called Von
9 Hippel-Lindau, or VHL disease, that they have a very high
10 chance of developing renal cell carcinomas. That led to an
11 examination of that gene in people who don't have that specific
12 genetic abnormality, and it was found that probably around 75
13 to 80 percent of renal cell carcinomas, in general, have
14 abnormalities in that particular gene. And that's led to a
15 whole avenue of investigation in investigating other genes that
16 are related to VHL that can also lead to the development of
17 kidney cancer. But more importantly, it's given us insight
18 into the mechanism by which this gene can cause cancer.

19 Q What do you mean by that?

20 A Essentially, the VHL gene and a number of these other
21 genes that have shown to be causative for kidney cancer, all
22 lead to activation of a gene called hypoxia inducible factor
23 alpha 2. It's a fancy name for HIF 2 alpha. This gene is in
24 response to hypoxia. That seems to be the common thread.
25 Actually, as Dr. Bahnsen pointed out, it's a common thread for

Vol. 12 - 200

1 the VHL gene and all these other genes. There's probably five
2 or six other genes that are involved with these.

3 The common thread is this activation of this HIF 2
4 alpha. That gene is important because what it does is, when
5 it's activated, it makes the kidney cells proliferate. And
6 it's that proliferation of the kidney cells that eventually
7 leads to the development of the cancer.

8 So it's begun to tie together a lot of different aspect
9 of kidney cancer which has been very important because now we
10 actually have a target for the treatment of kidney cancer,
11 which is being utilized in a number of clinical trials.

12 Q Sir, this VHL gene, is that on chromosome three?

13 A Yes.

14 Q And are you familiar with something -- have you heard
15 the phrase spontaneous DNA replication errors?

16 A Yes.

17 Q What does that mean?

18 A Basically, every time DNA divide, replicates itself and
19 the cell divides, that mistakes happen; not very many given the
20 enormity of number of letters in the gene alphabet. But it --
21 some of these can occur. And if all of the mistakes that are
22 needed for development of cancer occur in a single cell, then
23 you eventually will develop cancer.

24 Q And can those spontaneous DNA replication errors occur
25 without any external factor, any chemical exposure, anything

1 else?

2 A Just DNA replication itself will lead to a small number
3 of errors. It's just when you put that into perspective of the
4 literally billions of cells in our body that are replicating
5 every day, the chances of abnormalities happening increases
6 significantly.

7 Q In terms of the thoroughness of Dr. Bahnsen's
8 investigation, did you see any indication that he did any
9 genetics testing on Mrs. Bartlett?

10 A I don't believe he did, nor have any of the other
11 physicians that I'm aware of.

12 Q Do you recall his comment -- I can't recall if it was
13 D.C. He said you would have to go somewhere for that, like
14 there's only one place in the country to get genetics testing?
15 Is that accurate?

16 A I think he referred it was all at the National Cancer
17 Institute. In reality, this is done in many institutions
18 including here at Ohio State, the Cleveland Clinic, any major
19 medical center would do these kinds of analyses.

20 Q I don't want to dwell too much on any one of these.
21 Workplace chemical exposure. Did you think Dr. Bahnsen
22 thoroughly evaluated whether workplace chemical exposure was a
23 proximate cause of her kidney cancer?

24 A He didn't mention any workplace exposures or possible
25 exposures for Mrs. Bartlett.

1 Q Did you see anything on the records that indicate at
2 least something that should be looked into?

3 A I thought there was one aspect that needed to at least
4 be explored, and that was the fact that she stated in her
5 testimony that she goes for, I believe, lunch at a dry cleaner
6 and cleaning facility. One of the chemicals used in dry
7 cleaner facilities is this trichlorethylene, which has been
8 classified as a known human carcinogen.

9 Q I don't want to spend too much time on these lists.
10 Doctor, you've talked about a number of factors that can lead
11 to kidney cancer. But do some people get kidney cancer for no
12 identifiable reason?

13 A Yes.

14 Q And in fact, unfortunately, is that common?

15 A Unfortunately, yes.

16 Q And sir, as much as people would like to find something
17 to blame, are we always able to find out the cause of a
18 specific individual's cancer?

19 A No. I think it's been estimated that approximately half
20 of the cancers that develop in the United States that lead to
21 death do we actually have a known cause for, or even possible
22 cause.

23 Q Doctor, I want to shift for just a couple minutes, a few
24 minutes, and talk about the time. I want to take you back in
25 time to the '80s and the '90s.

1 A Okay.

2 Q A lot of our discussions have been down here in green.

3 I want to take you back to the '80s and '90s.

4 A Okay.

5 Q Sir, you say you have some familiarity with animal
6 studies for cancer and how those results should be applied to
7 humans or should not be applied to humans?

8 A Yes.

9 Q And I want to take you back to the state of the science
10 back in the '80s and '90s.

11 A Okay.

12 Q Are you able to do that?

13 A Yes.

14 Q All right.

15 A Remember my history goes back to the '60s.

16 Q You're not that much older than me.

17 The jury has heard about a rat study that showed benign
18 Leydig cell tumors at high doses of C-8 that was conducted by
19 3M Corporation in the late '80s. Are you familiar with that
20 study?

21 A Yes.

22 Q First of all, let's back up a few steps. Are the
23 results of animal studies always applicable to humans?

24 A No.

25 Q For example, do some of the common medicines that human

1 beings take cause cancer in laboratory animals?

2 A Many of them do. Actually, it's been estimated that
3 approximately 50 to 60 percent of the drugs that are in the
4 Physician's Desk Reference, which is a compilation of all the
5 drugs on the market, about 50 to 60 percent have tested
6 positive in a rat, mouse, or both.

7 Q In fact, did you look at Mrs. Bartlett's list of
8 medicines?

9 A Yes. At least one of those is a known animal
10 carcinogen. Omeprazole, which she's taking for
11 gastroesophageal reflux disease, otherwise known as Prilosec,
12 is a well-known carcinogen in rats and mice. It produces a
13 type of stomach cancer.

14 Q Just so the jury is perfectly clear, you're not claiming
15 that -- I can't even pronounce it.

16 A Omeprazole.

17 Q That one. You're not claiming that caused her kidney
18 cancer?

19 A No. Everything we know about that drug is that it
20 causes stomach cancer in rats and mice by a mechanism that's
21 not relevant to humans.

22 Q Your only point is that some substances can cause a
23 disease in one animal but not another?

24 A Correct.

25 Q So back in the '80 and '90s, when this study came out in

1 the late '80s that shows Leydig cell tumors in rats, should
2 that have put DuPont on notice back at that time, knowing what
3 was known at the time, that C-8 was a human carcinogen?

4 MR. DOUGLAS: Objection on the grounds that is going
5 to general causation.

6 THE COURT: All right. Overruled. This goes to
7 knowledge of DuPont in the '80s, not to the standard we've been
8 talking about.

9 MR. MACE: I tried to make that very clear.

10 BY MR. MACE:

11 Q Sir, you can answer the question.

12 A I believe the study was reported and completed in 1987
13 or thereabout. By that point in time, number one, we know that
14 Leydig cell tumors in certain strains of rats were very common.
15 This particular strain of rat, it certainly is very common.
16 And that number two is that they're almost -- not almost, they
17 are always benign. They never evolve into malignant tumors.
18 Number three is there is already a considerable amount of
19 evidence that they did not have any relevance to humans. So I
20 don't think it would have been appropriate to interpret at that
21 time that this posed a cancer risk to humans.

22 Q All right. Let's go back -- I'm going to take you back
23 to today. We talked about diagnosis of the cancer and
24 Dr. Bahnsen's opinions. Then I took you back in time to talk
25 about DuPont's reaction and conduct. Now I'm coming back to

1 today as we sit here in 2015.

2 I wanted to talk about Mrs. Bartlett and her medical
3 records you reviewed. Have you reviewed the medical records
4 and the testimony that following Mrs. Bartlett's successful
5 surgery in 1997 with what you said was a Grade 1, Stage 1
6 tumor, that she has remained cancer free for almost 20 years
7 now?

8 A Yes.

9 Q Sir, do you have an opinion to a reasonable degree of
10 scientific certainty as to whether it is likely or unlikely
11 that her kidney cancer will return at this point?

12 A This kidney cancer is very unlikely to return. She
13 continues to have now two risk factors for development of
14 possibility of a new kidney cancer, and that is she's both
15 obese and hypertensive at this point. At the time --

16 Q Let me slow you down a few steps. I want to make sure
17 we get this clear.

18 With regard to her prior tumor that was removed in '97,
19 are you saying it is likely or unlikely to a reasonable degree
20 of medical certainty as to whether that tumor will come back?

21 A It's very unlikely.

22 Q Then you said she remains at risk for two factors of
23 getting a new kidney cancer. What were you saying about that?

24 MR. DOUGLAS: Objecting to the previous question.

25 THE COURT: Overruled.

1 BY MR. MACE:

2 Q Continue.

3 A She not only continues to be obese, but she also has
4 developed hypertension. She was not hypertensive at the time
5 of her original surgery, but now she is. She has two major
6 risk factors of her development of a new kidney cancer.

7 Q Doctor, with regard to that last topic, are you aware of
8 the evidence that C-8 has been filtered out of Mrs. Bartlett's
9 Tupper's Plains water since the spring of '06?

10 A Yes.

11 Q Do you have an opinion to a reasonable degree of
12 scientific certainty as to whether, sitting here today,
13 compared to the average person in the general United States
14 population, whether Mrs. Bartlett is at any increased risk of
15 kidney cancer from her past exposure to C-8?

16 A Well, given the gradual elimination --

17 MR. DOUGLAS: Objection, Your Honor.

18 THE COURT: I'll see you at side-bar. You may stand,
19 if you wish, ladies and gentlemen.

20 - - -

21 Thereupon, the following proceeding was held at side-bar
22 out of hearing of the jury:

23 THE COURT: So this goes to risk of future development
24 of kidney cancer. Why is this improper?

25 MR. DOUGLAS: He said he hasn't considered C-8 as a

Vol. 12 - 208

1 risk factor. We know she had exposure because she's not --
2 it's undisputed she is --

3 THE COURT: The problem is he didn't believe .05 was
4 ever a risk factor.

5 MR. DOUGLAS: That is inherent in what he was going to
6 say. This is what was excluded.

7 MR. BILOTT: This goes directly to what was the
8 problem with the specific causation.

9 THE COURT: I'm with you on this. I think you're
10 right, because otherwise to cross him on this effectively, you
11 would have to get back in the opinion that was excluded. So
12 this needs to be excised as well.

13 MR. PAPANTONIO: One other thing. We intend to file a
14 motion to excuse the sleeping juror at the break. I'd like the
15 Court to review it, if you would.

16 THE COURT: Why don't we address this at five o'clock.
17 How does that sound?

18 MR. PAPANTONIO: That's fine.

19 THE COURT: We're not going to do anything with him
20 now.

21 MR. MACE: He's been fairly attentive, I thought, this
22 afternoon.

23 MR. DOUGLAS: He missed three quarters of what's
24 happened so far.

25 MR. MACE: That's not accurate.

Vol. 12 - 209

1 THE COURT: It sounds like you're opposed to this.

2 MR. MACE: Yes. I thought there was much more interim
3 relief that can be done.

4 THE COURT: Let's do this. At five o'clock, we'll
5 address this.

6 (Back in open court.)

7 THE COURT: Mr. Mace, you may continue.

8 BY MR. MACE:

9 Q Dr. Cohen, before I wrap up, were all the opinions that
10 you gave to me today made to a reasonable degree of scientific
11 certainty?

12 A Yes.

13 Q And do you charge for your time?

14 A Yes.

15 Q What is your hourly rate?

16 A Six hundred dollars per hour.

17 MR. MACE: I have nothing further for you at this
18 time.

19 THE COURT: This would be a good time for our
20 mid-afternoon break. We'll be in recess for 15 minutes.

21 (Recess taken from 2:52 to 3:05.)

22 THE COURT: All right. The defendants may call their
23 next witness.

24 MR. PAPANTONIO: Your Honor, may we approach?

25 THE COURT: If you'd like.

1 Take a stand by your seats, and I'll see you in just a
2 moment, ladies and gentlemen.

3 (Discussion at side-bar as follows:)

4 MR. PAPANTONIO: We would like to move to strike all
5 of the testimony that was just put on by this particular
6 witness to preserve our record. He went -- A, this was a
7 witness who did not make it past summary judgment. B, it was a
8 witness that did not make it through a Daubert evaluation.

9 He's come into court, and he is now -- he's now created
10 another idea of spontaneous -- I suppose it's the idea that
11 there is some spontaneity to the process of cancer.

12 There are experts that we could have brought had we
13 known that this was going to occur. We now are under a cloud.
14 There is no way to correct this problem. He has been allowed
15 to say things that are completely on the edge that would never
16 withstand a Daubert test. And so we are -- we are in a
17 situation, Judge, the only thing we can do is move to strike
18 the testimony to preserve the record.

19 THE COURT: Well, this is what I think my earlier
20 opinions parsed through.

21 In the abstract, if this were -- if the defense had the
22 burden of proof that obesity was the cause, you'd lose -- I
23 think -- from my ruling. Maybe you don't concede that that
24 would be the issue. Their burden, though, isn't to prove
25 causation. It's the plaintiff's to prove.

Vol. 12 - 211

1 The defendant -- I called this person a bocce ball, if
2 you'll remember. That's what he's for. And the jurors were
3 told that there is no opinion that obesity was a causal factor.
4 All they know is that this can be used to try to discredit your
5 claim that C-8 is the causative factor. So, I get the
6 objection. I note it. It's preserved, but we'll go forward.

7 MR. MACE: While we're here, we want to make sure we
8 proffer and I don't forget that, if allowed --

9 THE COURT: What he would have said if not struck.

10 MR. MACE: Thank you, sir.

11 THE COURT: Yes.

12 MR. MACE: If allowed, he would have testified to all
13 of the opinions reflected on his report and all of the things
14 that have been in our briefs.

15 THE COURT: And do that when you need to, but I want
16 to put on the record here, so both sides can use this, anything
17 I've excluded up to this point in motions in limine are
18 preserved. But if you want to make more record with it, go
19 right ahead.

20 MS. NIEHAUS: Your Honor, does that count, as well,
21 for -- I mean, we were going to proffer Rettos, for example.

22 THE COURT: Anything that I've stricken -- and that
23 would be Rettos, and I haven't -- I've stricken most of
24 Flaherty -- that's all preserved. Okay?

25 MR. MACE: Thank you.

Vol. 12 - 212

1 MR. PAPANTONIO: The only other thing that I just want
2 to make clear, we're going to the issue, also, of spontaneous
3 replication. That becomes very important, because there are
4 experts who think that is completely voodoo. And now we have
5 no -- we have no ability to get a witness in here for that.

6 MR. MACE: Well, let me just note for the record that
7 Dr. Bahnsen acknowledged that that occurs.

8 THE COURT: All right. Thank you.

9 (Back in open court.)

10 THE COURT: I misspoke. We're not calling a new
11 witness. We're going to have a cross-examination of Dr. Cohen.

12 So, with that, Mr. Douglas, you may proceed.

13 MR. DOUGLAS: Thank you, Your Honor.

14 - - -

15 CROSS-EXAMINATION

16 BY MR. DOUGLAS:

17 Q. Good afternoon, Dr. Cohen. How are you today?

18 A. Good. Thank you.

19 Q. Very good.

20 I just have a few questions for you.

21 You were very critical of Dr. Bahnsen both with respect
22 to his qualifications and the way he went about reaching his
23 conclusion regarding the cause of Ms. Bartlett's renal cell
24 carcinoma just a few moments ago during direct examination.

25 Right?

1 A. About his qualifications regarding causation, not his
2 qualifications regarding his abilities as a surgeon.

3 Q. Okay. So, you took issue with his qualifications to
4 render an opinion on causation and then the way in which he
5 did, in fact, go about reaching his conclusion. Do I have it
6 right?

7 A. Yes.

8 Q. Okay. So, you say you are in a better position to
9 render an opinion than Dr. Bahnsen on those subjects -- on that
10 subject, right?

11 A. Yes.

12 Q. You're in a better position than Dr. Bahnsen, the doctor
13 who treated Mrs. Bartlett for nearly a decade; is that what
14 you're telling us?

15 A. Again, with regard to causation, yes; not with regard to
16 her clinical management.

17 Q. You're in a better position than the doctor who treated
18 her for ten years, who's written textbooks, who's written 50
19 chapters and textbooks, or edited chapters and textbooks, over
20 150 articles on cancer -- including articles on cancer, who's
21 treated thousands of patients and had to make life-and-death
22 decisions, not sitting in a laboratory looking at specimens
23 under a microphone -- under a microscope, but making life-and-
24 death decisions on the front lines of the James Cancer
25 Hospital, where his decision as to what may have caused

1 somebody's cancer might make the difference between life and
2 death, that's the Dr. Bahnsen we're talking about that you're
3 in a better position than?

4 A. His decisions at the time of surgery and treating the
5 patient are not based on causation. His abilities as a surgeon
6 I'm not questioning.

7 I've known Dr. Bahnsen for more than 20 years. I've
8 served on panels with him, but his abilities in causation --
9 and his publications are not on causation -- I'm in a better
10 position than he, because --

11 Q. Doctor, you haven't treated a patient --

12 THE COURT: Wait. One moment.

13 MR. MACE: Your Honor, --

14 THE COURT: The answer wasn't finished.

15 Go ahead and finish your answer.

16 MR. DOUGLAS: Sorry.

17 THE WITNESS: Okay.

18 With regard to causation, I am better trained and in a
19 better position than he is. He has treated patients. He has
20 not dealt with causation issues. He hasn't been trained in
21 that.

22 BY MR. DOUGLAS:

23 Q. Than Dr. Bahnsen, who makes life-and-death decisions and
24 gives a treatment plan to patients that sometimes and often
25 involves decisions that are based on what caused a patient's

1 cancer in the first place?

2 A. In this instance, that clearly was not the case, as his
3 deposition -- his first deposition was --

4 Q. Just yes or no, sir.

5 A. I can't answer it yes or no without putting it in
6 context.

7 Q. So, you haven't treated a patient, face to face, with
8 renal cell carcinoma since your residency in 1975; isn't that
9 true?

10 A. Yes, that's true.

11 Q. We're going to put you on this list, this chronology.

12 That would be way back here (indicating), in 1975, the
13 last time you treated a patient, face to face, like Carla
14 Bartlett, with renal cell carcinoma, right?

15 A. Correct.

16 Q. Gerald Ford was the president. The Brady Brunch, I
17 think, was on television, as was pointed out by defense
18 counsel. That's how long ago it was since you've actually
19 treated a patient --

20 A. Correct.

21 Q. -- for renal cell carcinoma. And you still don't see
22 patients directly. You see their specimens, correct?

23 A. Most of the time, that's correct.

24 Q. And when we're talking about specimens, we're talking
25 about a surgical slide, right?

1 A. No. I get the gross specimen and the slides.

2 Q. Okay. You're talking about you're in the laboratory, or
3 in your office? Where do you look at the surgical slides and
4 the specimens?

5 A. The specimens, themselves, are received in a grossing
6 room, which is part of the operating suite. And the slides
7 come either to my office or to the resident's office or to a
8 reading room.

9 Q. So, you can't ask a specimen -- you can't take a history
10 from a specimen. You've been critical of the way Dr. Bahnsen
11 took a history from Ms. Bartlett, an actual patient, but you
12 can't take a history from a specimen, right? You don't do
13 that?

14 A. Most of the time -- most aspects, you can't take the
15 history. There are some aspects that, yes, a slide will give
16 you a history.

17 Q. You can't ask a specimen on a microscopic slide did your
18 brother, did your uncles, did your aunts have kidney cancer.
19 You can't do that. You don't do that.

20 A. Not usually, but if a genetic analysis is involved, I am
21 involved with that.

22 Q. But you're critical of the way in which Dr. Bahnsen took
23 a history, right?

24 A. Yes, I am.

25 Q. But you don't do that?

1 A. I do not.

2 Q. You ever hear the expression "a back-seat driver"?

3 A. I'm not a back-seat driver.

4 Q. I didn't ask you if you were. I just asked you if you
5 ever heard the expression.

6 A. I have heard the expression.

7 Q. You don't see patients with Von Hippel-Lindau Syndrome
8 in an office, face to face, right?

9 A. Correct.

10 Q. So, Dr. Bahnsen testified that, in his years of
experience, his 30-plus years of experience of treating cancer
11 patients and other patients, he understands the clinical signs
12 and symptoms of patients with Von Hippel-Lindau, and they
13 present with unusual physical characteristics. Did you read
14 that part of his testimony?

16 A. Yes.

17 Q. So, when you're looking at a slide under a microscope in
your laboratory, Doctor, back in Nebraska, you don't see the
18 physical presentation. You don't see the -- you can't -- the
19 slide doesn't display for you the physical features or the
20 facial features of the patient, right?

22 A. The slide itself doesn't. We frequently are given the
history of it from the patient, though, as part of the
23 evaluation.

25 Q. Okay. But you do not take a history. You just told us

1 that.

2 A. I do not take the history, except sometimes the genetic
3 aspects.

4 Q. You do not see the patient, and so you don't have an
5 opportunity to observe the patient and see whether or not they
6 have the physical signs, the clinical signs, the facial
7 features and other unique symptoms of something like Von
8 Hippel-Lindau syndrome, right?

9 A. Only if a photograph is provided to us, which frequently
10 is.

11 Q. You frequently get a photograph with the specimen; is
12 that what you just said?

13 A. Yes.

14 Q. And you make no treatment decisions with respect to
15 these patients; you're just making a diagnosis?

16 A. We're part of a treatment plan, frequently, as a
17 presentation at a tumor board, which is where the urologist,
18 the clinical oncologist, radiotherapist and the pathologist get
19 together and discuss cases.

20 Q. You're not the captain of the ship. The treating
21 physician is the captain of the ship and makes the ultimate
22 decision and listens to persons like yourself, the pathologist
23 or radiologist, other subspecialties. And the treating
24 physician is the one who takes all of the different
25 subspecialties and makes a decision for what is going to happen

1 with respect to treatment. Right?

2 A. That's correct.

3 Q. And you rarely find yourself in the position of being
4 the captain of the ship, the person who is ultimately
5 responsible for the treatment of a patient. Correct?

6 A. That's correct.

7 Q. So, you're not an oncologist, correct?

8 A. That's correct.

9 Q. You are not a uro-oncologist like Dr. Bahnsen, correct?

10 A. That's correct.

11 Q. You're not a surgeon?

12 A. That's correct.

13 Q. You've never performed a nephrectomy, right?

14 A. I assisted in nephrectomies in medical school and
15 residency. I've never done one myself.

16 Q. Okay. So that would, again, be back in the 1970s?

17 A. A long time ago.

18 Q. And you're not an epidemiologist?

19 A. I have experience with epidemiology, but I'm not an
20 epidemiologist.

21 Q. And these -- I believe you cited six, if my count is
22 right -- one, two -- five or six -- I might be off by one --
23 studies that talked about an association or risk or causation,
24 whatever you want to call it, between obesity and renal cell
25 carcinoma, right?

1 A. Yes. That was some of the articles that I reviewed.

2 Q. Okay. Out of -- out of a total of 20?

3 A. Probably 20 and a few more reviews.

4 Q. Okay. And those are epidemiology studies, right --

5 A. They are.

6 Q. -- for the most part?

7 A. Yes.

8 Q. And there's a meta-analysis?

9 A. Including meta-analyses, yes.

10 Q. And the meta-analysis, just so we're clear, is just a
11 review. It has no original data. It's just a review of other
12 studies, right?

13 A. It's a statistical evaluation of multiple studies. It
14 actually is new data. It's just a composite of previously
15 published or analyzed data.

16 Q. Right. So, you know -- being that you're not an
17 epidemiologist, sir, you know, and our jury heard, that DuPont
18 has a whole epidemiology department. You know that, right?

19 A. I do not know if they have a department. I know they
20 have epidemiologists involved. I don't know if it's a whole
21 department.

22 Q. Okay. But you know they have epidemiologists?

23 A. Yes.

24 Q. And you are not one of them?

25 A. Correct.

Vol. 12 - 221

1 Q. And you know, sir, because you read his report, that
2 DuPont hired, like you -- your only connection to this case, by
3 the way, is that you're hired by a law firm, right?

4 A. That's correct.

5 Q. There are many doctors who, over the course of years,
6 have treated Ms. Bartlett, right?

7 A. Yes.

8 Q. And you read their medical records, right?

9 A. Yes.

10 Q. And, by the way, not a one said a word about obesity
11 having one iota or anything to do with her renal cell carcinoma
12 in all of the records you reviewed, correct?

13 A. Her medical records didn't give any evaluation of her
14 causation.

15 Q. And, Doctor, you know, because you read his report, that
16 the defendant hired, like yourself, --

17 MR. MACE: Objection, Your Honor.

18 May we approach?

19 THE COURT: Well, I haven't heard the whole question
20 yet, but we will.

21 You may stand by your seats, if you wish, ladies and
22 gentlemen.

23 (Discussion at side-bar as follows:)

24 THE COURT: Let me get the whole question first.

25 MR. DOUGLAS: That the defendant hired an expert in

Vol. 12 - 222

1 epidemiology, Dr. Weed, whose report he read and whose
2 testimony he opined on at his deposition.

3 THE COURT: So, it's the absence of him testifying is
4 what you want to get into?

5 MR. DOUGLAS: Yes.

6 THE COURT: What's your position?

7 MR. MACE: My position is, one, I have to object at
8 that point because I can't unring a bell. So that's why I
9 interrupted counsel.

10 I apologize for interrupting you, --

11 MR. DOUGLAS: That's all right.

12 MR. MACE: -- I need to preserve. And, two, we
13 clarified this before. Their Dr. Bahnsen got on the stand,
14 because I was going to cross him with Dr. Siegel's testimony,
15 and Siegel didn't testify --

16 MS. NIEHAUS: Margulis.

17 MR. MACE: Margulis. I'm sorry. But we covered it in
18 one of the 8:30 conferences that it would be improper to cross
19 or use the testimony of an expert who wasn't going to be
20 presented. So I was prohibited from doing that in their case,
21 and I expect the same rule to apply in my case.

22 THE COURT: I don't remember that being the rule at
23 all. What would you have preferred to ask Dr. Siegel about?

24 MR. MACE: I would have preferred to ask Dr. Bahnsen
25 about Margulis' opinions which were inconsistent with

1 Bahnsen's.

2 THE COURT: But Bahnsen didn't rely on them. If he is
3 relying on somebody else's opinion, then he can be crossed on
4 it. That's the difference.

5 MR. MACE: But he's not relying on it for the opinions
6 you've left in the case. You've taken out 80 percent of his
7 opinions, Your Honor.

8 THE COURT: Well, you need to cover that, too, --

9 MR. MACE: Those went to the other article because it
10 was the general causation opinion that he was relying on
11 before, and that's gone.

12 MR. DOUGLAS: Just to be clear, the opinion is the
13 opinion that Dr. Weed expressed about obesity and renal cell
14 carcinoma, which was that he doesn't believe there is anything
15 in the literature that establishes --

16 THE COURT: If it stays with that --

17 MR. DOUGLAS: That's where I'm going.

18 MR. MACE: Your Honor, if I could clarify, Dr. Weed
19 was not in the scope of his -- At deposition, it was not within
20 the scope of his work in this case or his opinions to analyze
21 the causation issue between obesity and renal cell carcinoma.
22 It was not within the scope of what he was doing.

23 Counsel asked him questions on something he wasn't even
24 within the scope of his thing -- of his assignment, his report
25 and his opinions. And we objected at the time, but we can't do

1 anything when Your Honor is not there to rule on it. But to
2 allow him to open a known door to create a scope that wasn't
3 even --

4 THE COURT: We got far, far into obesity here on
5 direct. The ruling is you can -- you stay on the obesity
6 issue.

7 MR. DOUGLAS: That's where I'm staying.

8 THE COURT: Not anything that would call into question
9 the issue of the rejected opinion by this doctor.

10 MR. DOUGLAS: Staying on obesity.

11 THE COURT: Okay.

12 (Back in open court.)

13 THE COURT: You may continue.

14 MR. DOUGLAS: Thank you, Judge.

15 BY MR. DOUGLAS:

16 Q. So, you know, because you read his report and we
17 discussed him at your deposition when I questioned you, that
18 the defendant hired an outside expert like yourself, a person
19 who is an epidemiologist, and a well regarded one at that,
20 Dr. Weed. Right?

21 A. Yes.

22 Q. In fact, you would agree with me that Dr. Weed, who has
23 authored many textbooks/articles on this subject of cause and
24 effect between an exposure and a disease like obesity and
25 cancer or smoking and cancer, that you referred to him as the

1 guru of cause and effect?

2 A. He is one of the gurus. There are certainly many other
3 people that published on this. And the ultimate guru was Dr.
4 Hill in 1964 or '5.

5 Q. But this is -- but this guru is the one that this
6 defendant hired for this case, Dr. Weed, right?

7 A. Yes.

8 Q. And, sir, I played you a portion of his testimony that I
9 had taken. Do you recall that happening at the deposition,
10 your deposition, when I questioned you?

11 A. I -- I recall you reading some of it. I don't remember
12 if it was played or not.

13 Q. We actually played it. And we're happy to play it again
14 if you'd like.

15 A. That's fine.

16 Q. And do you recall that it was Dr. Weed's opinion and
17 testimony that he had done an exhaustive search, like you, an
18 exhaustive search on the subject of obesity and renal cell
19 carcinoma and found nothing in the literature to establish that
20 it is generally accepted, not just five or six articles or 20
21 articles or 21 articles. He found nothing in the scientific
22 literature from his exhaustive search on the subject to
23 establish that it is generally accepted that obesity is a --
24 not a risk factor -- a cause of renal cell carcinoma. Do you
25 remember that?

1 A. I don't remember his exact words, but his overall
2 evaluation was that it's a major risk factor.

3 An attributable risk could be a -- was a major cause --
4 a cause.

5 MR. DOUGLAS: Could we play that testimony, please?

6 (Thereupon, the following video clip was played:)

7 Question: So you don't know whether it's generally
8 accepted or not as to whether obesity is a causal association
9 for renal cell carcinoma? You don't know?

10 Answer: I didn't say that.

11 Question: Do you know?

12 Answer: What I said was that what the literature that
13 I've reviewed says is that obesity is a risk factor for renal
14 cell carcinoma. And I also said that I have not seen a
15 statement laying claim to causality.

16 Question: Okay. And do you think you did a pretty
17 thorough review of the literature on the subject?

18 Answer: Reasonably thorough, yes.

19 Question: So would it be fair to say that, based on
20 your research, it is not generally accepted that renal -- that
21 obesity is considered a causal risk factor for renal cell
22 carcinoma?

23 Answer: It's like I said before, I haven't seen that
24 statement. I would say that it is generally accepted it's a
25 risk factor.

1 Question: But not a causal risk factor?

2 Answer: I haven't seen that in the -- in the
3 literature.

4 BY MR. DOUGLAS: (Continuing)

5 Q. Sir, do you recall when I played that portion of the
6 deposition for you at your deposition?

7 A. Vaguely, yes.

8 Q. And you disagreed with Dr. Weed's testimony at that
9 time. I'm happy to play your answer to that question from the
10 deposition.

11 A. No. I was just disagreeing with that statement to an
12 extent, the part that he hasn't seen it written. But as we saw
13 in my earlier testimony today, there is several publications,
14 including the textbooks in Urology and the American Cancer
15 Society, that list it as a cause.

16 Q. As a risk factor.

17 A. No. They link it as a cause.

18 Q. We will go back. And, by the way, there is -- you do
19 recognize there is a difference between risk factor and
20 causative risk factor, right?

21 A. That's correct. And they list it under cause.

22 Q. Thank you for answering the question. I have another
23 one for you.

24 A risk factor is something that's associated with
25 increased risk of a disorder, correct?

1 A. Correct.

2 Q. And did you hear Dr. Bahnson's bow-tie analogy
3 describing what an association is? Did you read that part of
4 his testimony?

5 A. I did, yes.

6 Q. Okay. And just because two things are associated with
7 one another doesn't mean that one causes the other, right?

8 A. That's correct.

9 Q. And a causal risk factor is a factor that, with further
10 evaluation, can be identified as actually being causative,
11 correct?

12 A. Correct.

13 Q. Okay. So, you -- you brought, and I have them here,
14 five or six articles to the attention of our jurors out of a
15 total of 20 or so articles on the subject, some of which have
16 actually used the word "cause," right?

17 A. That's correct.

18 Q. Okay. Now, there were thousands and thousands of
19 articles in the scientific literature, the universe of
20 scientific literature, tens of thousands; aren't there?

21 A. Overall, probably millions.

22 Q. Millions. Great!

23 And there are dozens of reputable journals out there,
24 right?

25 A. Yes.

1 Q. And each one of those journals publishes articles every
2 month or every few months or every year, and the amount of
3 literature continues to grow and grow and grow, right?

4 A. Yes.

5 Q. And, for example, there are thousands of articles on
6 smoking being a cause of lung cancer, for example, right?

7 A. I don't know how many, but lots, yes.

8 Q. It's probably in the thousands by now, right?

9 A. Could be, yes.

10 Q. Okay. And there are hundreds, if not thousands, of
11 articles on asbestos causing lung cancer or asbestosis, right?

12 A. Certainly several hundred. I don't know about
13 thousands.

14 Q. Okay. And I'll get back to your 20 articles, only six
15 of which you have shared with the jurors, but -- and that's a
16 good thing when people contribute to the scientific and medical
17 literature, right?

18 A. Yes.

19 Q. Okay. It's a place for dialogue and debate of ideas,
20 and it's for the purpose of advancing science and medicine.
21 Agree?

22 A. Yes.

23 Q. And if you -- out of that -- you could find -- in the
24 scientific literature, if you look at this millions of
25 articles out there in the universe, you can find basically

1 anything linking almost anything to cancer in the peer-reviewed
2 literature, right, if you look?

3 A. No. I think it's somewhat limited, but there are
4 certainly a large number of items that are listed.

5 Q. Well, I was curious, so I took a look. And, you know --

6 MR. DOUGLAS: Let's have the oxygen-causes-lung-cancer
7 article published?

8 And I'll get to your six or seven.

9 May I approach?

10 THE COURT: You may.

11 BY MR. DOUGLAS:

12 Q. Do you see the title of this article? Do you see the
13 title is Lung Cancer Incidence Decreases With Elevation,
14 evidence for oxygen as an inhaled carcinogen? Do you see where
15 I'm reading from?

16 A. Yes.

17 Q. And a carcinogen is something that causes cancer, right?

18 A. Correct.

19 Q. And this is saying evidence of oxygen, what we're
20 breathing right now, as an inhaled carcinogen. Did I read that
21 right?

22 A. Yes.

23 Q. One second.

24 How about citrus? Have you read the articles about how
25 citrus causes melanoma? Have you read those articles --

1 A. No, I haven't.

2 Q. -- in the peer-reviewed journals?

3 A. No.

4 MR. DOUGLAS: Can we get that one, please?

5 May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. DOUGLAS:

8 Q. The Journal of Clinical Oncology, that's a peer-reviewed
9 journal, right?

10 A. Yes.

11 Q. It has to pass peer-reviewed muster, right?

12 A. Yes.

13 Q. It's got to show some scientific validity, right?

14 A. Yes.

15 Q. You see where it says: Conclusion. Citrus consumption
16 was associated with an increased risk of malignant melanoma in
17 two cohorts of women and men? Do you see that?

18 A. Yes.

19 Q. Have you seen this before?

20 A. I have not seen this article, no.

21 Q. How about the American Journal of Epidemiology? A
22 prestigious journal, right?

23 A. It's a good journal on epidemiology, yes.

24 Q. Okay.

25 MR. DOUGLAS: Can we have the Vitamin D and pancreatic

1 cancer?

2 May I approach?

3 THE COURT: You may.

4 BY MR. DOUGLAS:

5 Q. Here, we have the American Journal of Epidemiology,
6 2010. Anticancer Vitamins du Jour, the ABCEDs so far.

7 If you go -- flip the page, you'll see it says: The
8 only association observed in this set of six analyses was a
9 troubling one. The risk of pancreatic cancer was doubled for
10 those in the highest quintile of circulating Vitamin D levels.

11 Do you see where I'm reading from? And have you ever
12 heard about Vitamin D causing pancreatic cancer or being
13 associated with it?

14 A. I've seen several articles that have been published
15 relating low Vitamin D levels associated with various cancers,
16 including pancreas, but higher Vitamin D levels tend to be
17 protective. It's in contrast to this. This is in contrast to
18 those.

19 Q. Okay. Right. Somebody in a peer-reviewed journal has
20 published an article in the Journal of Epidemiology that there
21 is an association between increased levels of Vitamin D and
22 pancreatic cancer. That got into peer-reviewed literature,
23 right?

24 A. This was an editorial. So it would not have been peer
25 reviewed.

1 Q. Okay. It's an editorial, correct?

2 A. Correct.

3 Q. Someone expressing an opinion.

4 A. Correct.

5 Q. Debate and dialogue is what scientific literature is all
6 about.

7 A. Correct.

8 Q. You put your theory out there, you do your research, and
9 you see -- sometimes your theories get debunked, sometimes
10 they're accepted, and sometimes nobody cares. Right?

11 A. Correct. Because reproducibility is part of cancer,
12 that's why I think the strength of obesity is a very strong
13 one.

14 Q. Have you heard, sir, in your five or six articles out of
15 the 20 -- I appreciate that we didn't have to go through all
16 20 -- I thank you for that -- but we've also heard about there
17 are studies out there showing cell phones cause brain tumors.
18 Right?

19 A. There is one study that reported that. And subsequent
20 studies have found no association.

21 Q. Sometimes studies show there isn't an association.
22 Sometimes there are studies that show no associations.

23 A. That's correct.

24 Q. In fact, that meta-analysis you talked about, if
25 you -- you know that some of the studies that it cited, of

1 these 141 studies that it claims to have reviewed, or
2 articles -- you're looking at me like I'm wrong.

3 A. That was for all obesity-related cancers. For renal
4 cancer, there's only been about 20 or 25 studies.

5 Q. Great! So, sir -- that's not a lot of studies, 20 to
6 25.

7 A. Given the size of some of those studies, that's a lot of
8 investigation --

9 Q. Okay. Well, sir, --

10 A. -- with very consistent findings.

11 Q. Sir, what you didn't tell the jury about that
12 meta-analysis is that many of those studies found no
13 association.

14 A. No, that's not true.

15 Q. That's not true?

16 A. Of all the studies investigating obesity and renal cell
17 cancer, I believe there's only been one that did not find a
18 statistically significant elevated --

19 Q. There's actually more than that with respect to renal
20 cell carcinoma, because I went out and found them.

21 A. I have not seen them.

22 Q. Sir, you talked about this 2008 Renehan study. That's
23 the meta-analysis.

24 A. Yes.

25 Q. All right. That's the one that used the buzz words

1 "Bradford Hill criteria" and "causation," right?

2 A. Correct.

3 Q. Sir, that -- by the way, they were looking at 20
4 different cancers, not just renal cell carcinoma.

5 A. A large number of cancers. I don't think it was 20, but
6 it was a large number.

7 Q. It was -- it was 19 others, 20 including renal cell
8 carcinoma.

9 A. Okay. They did a broader analysis of the relationship
10 of obesity with cancer.

11 Q. So, when you told our jurors that it looked at 141
12 articles, only a small portion of that, as you just
13 acknowledged, had to do with renal cell carcinoma. You didn't
14 mean to suggest to our jurors, in other words, that there are
15 141 studies out there looking at renal cell carcinoma and its
16 association with obesity? Let's just clear that up.

17 A. That's correct.

18 Q. Okay. But it wasn't -- I brought this out on
19 cross-examination that, of the 141 that study looked at, you're
20 saying there's only 20 that dealt with renal cell carcinoma?

21 A. I never mentioned the 141 studies of epidemiology of
22 renal cell carcinoma and obesity. I mentioned 20 to 25.

23 Q. Sir, did you bother to go -- in that article, in the
24 Renehan article, it cites these -- it's a review of other
25 studies, right?

1 A. Correct.

2 Q. Okay. And they don't -- you cannot determine the name
3 or the study authors from the article itself, the one that
4 Mr. Mace flashed up on the screen, right?

5 A. They only list some of the studies, not all of them.

6 Q. You have to go to a web appendice to find the actual
7 study names, right?

8 A. Correct. That's typical of literature today as that --
9 a lot of journals don't want you to publish it and take up
10 space, but they have what's called supplemental information,
11 which is available on the web, which, if you're interested, you
12 can find that information then.

13 Q. And you looked at all hundred and forty -- you went on
14 the web and looked at the web --

15 A. No. I looked at the cases that I could find that were
16 related to renal cell. I didn't look at all the others. I had
17 done, in the past, the relationship with endometrial cancer and
18 breast cancer and colon cancer.

19 Q. Sir, what I'm asking you is whether or not you went on
20 the website of the journal that published the Renahan article,
21 the meta-analysis, --

22 A. I did not.

23 Q. -- and looked up all of the studies that it cited, that
24 it was based on.

25 A. I did not.

1 Q. And so you did not see, because I did -- you did not
2 see --

3 MR. DOUGLAS: Hiatt?

4 May I approach?

5 THE COURT: You may.

6 BY MR. DOUGLAS:

7 Q. I mean, you're familiar with the phrase "garbage in,
8 garbage out"?

9 A. Yes.

10 Q. Okay. And we've already established that -- so what
11 this Renehan summary was doing was looking at other articles
12 and studies, right?

13 A. Correct.

14 Q. And you didn't bother to go on the web to go pull those
15 actual studies -- you just told us that, right? -- and look at
16 them?

17 A. I only concentrated on the ones that were related to
18 renal cell carcinoma.

19 Q. You did not go on the web to pull those articles,
20 correct?

21 A. That's correct.

22 Q. Okay. So you did not see, then, for example, the Hiatt
23 study, renal cell carcinoma and Thiazide use, a case-control
24 study --

25 A. Correct.

1 Q. -- where it stated -- and this is one of the articles
2 here that that study you came to talk about is based on.

3 A. Uh-huh.

4 Q. So, it says: We found a statistically -- sorry. This
5 is like getting sea sick.

6 We found a statistically nonsignificant relation between
7 BMI and renal cell carcinoma.

8 Do you see that?

9 A. Yes.

10 Q. So, you did not read that for yourself until I pointed
11 that out to you just now, correct?

12 A. I did not look this up from the website. I had seen
13 this previously from a review of the literature that had been
14 cited by the IARC and a number of other organizations.

15 Q. It's not one of the 20 you say you relied on?

16 A. I believe this is actually the one that is negative.

17 Q. It is not -- this is not one of the 20 you cited in your
18 report?

19 A. I didn't cite all 20 of them in the report. I only
20 cited a significant number of them.

21 Q. The positives?

22 A. This is the one that was negative. I didn't cite this
23 one.

24 Q. Did not cite it and did not mention it to our jurors
25 today. If I'm not mistaken, you did not mention this on your

1 direct testimony.

2 A. I didn't on direct, and I don't remember if I included
3 it in the report or not. I'd have to see my report.

4 Q. You mentioned the American Cancer Society. And I
5 believe one of the articles you showed our jurors was written
6 by a member of the American Cancer Society. Do you recall
7 that?

8 A. Yes.

9 Q. Okay. And you know they have a website where they
10 inform the public -- where they keep the public informed about
11 statistics and data, prognosis, definitions, and information
12 related to cancer, correct?

13 A. They have a website for a lot of information, you're
14 correct.

15 MR. DOUGLAS: Can we have that printout of the
16 website?

17 May I approach, Your Honor?

18 THE COURT: You may.

19 BY MR. DOUGLAS:

20 Q. I'm going to put this up on the ELMO. This is printed
21 out from the American Cancer Society, I'll represent to you,
22 printed out yesterday from their website.

23 "Kidney Cancer (Adult) Renal Cell Carcinoma Overview,"
24 do you see that?

25 A. Yes.

1 Q. If you go to the page that I folded over on the corner,
2 you'll see there is a paragraph entitled "What are the Risk
3 Factors for Kidney Cancer."

4 A. Yes.

5 Q. And do you see where it says, We do not -- we do not yet
6 know exactly what causes kidney cancer, but we do know that
7 certain risk factors are linked to the disease? Do you see
8 that?

9 A. Yes. That's in contradiction to their other
10 publication. But, yes, I see that.

11 Q. There is debate and dialogue on the subject, right?

12 A. Well, it's from the same source in two different places.

13 Q. Sir, this is the source that is currently -- this is the
14 source that is currently on the American Cancer Society's
15 website, right?

16 A. Correct. And this is the document --

17 Q. Yes or no?

18 A. -- that they send to physicians.

19 Q. Yes or no will do. You'll have plenty of opportunity --

20 A. That's fine.

21 Q. -- to address anything you would like to address.

22 A. You're correct. You're correct.

23 Q. The World Health Organization, you're familiar with the
24 World Health Organization?

25 A. Yes.

1 Q. And they are an organization that looks out for the
2 interests of the health of the population of the world,
3 correct?

4 A. That's their purpose, yes.

5 Q. And they also issue information, disseminate
6 information, publish information that has to do with disease,
7 right?

8 A. Correct.

9 Q. Including cancer?

10 A. Correct.

11 Q. Including kidney cancer, right?

12 A. Correct.

13 Q. Okay. And including special -- and including the
14 obesity, so-called, epidemic, right?

15 A. That's correct.

16 MR. DOUGLAS: May I approach, Your Honor?

17 THE COURT: You may.

18 BY MR. DOUGLAS:

19 Q. If you'll go to page -- you'll see, here, I'm going to
20 put up on the screen, in a second -- you'll see the "Who,
21 Obesity and Overweight." Do you see that? "Media centre."
22 This is updated January 2015. Do you see that?

23 A. Yes.

24 Q. And it talks about key facts. Worldwide obesity has
25 more than doubled since 1980, do you see that?

1 A. Yes.

2 Q. Okay. And if you go to the next page, you'll see what
3 are common health consequences of overweight and obesity.

4 A. Yes.

5 Q. Raised BMI is a major risk factor for noncommunicable
6 diseases such as -- and it goes to say some cancers:
7 Endometrial, breast and colon. Do you see that?

8 A. Yes.

9 Q. It doesn't say kidney cancer in there, does it?

10 A. Here, it does not. Here, it does not.

11 Q. Now, sir, getting back to Dr. Bahnsen, we've talked
12 about risk factor, and we've talked about causative risk
13 factor. And you understand that all Dr. Bahnsen is saying in
14 his opinion is that obesity -- first of all, did I hear you
15 correctly say that Dr. Bahnsen doesn't -- did not acknowledge
16 that obesity is a known risk factor for renal cell carcinoma?

17 A. He stated that he did not think it was.

18 Q. Okay. Are you sure you read his testimony?

19 A. I believe so.

20 MR. DOUGLAS: Okay. Could you put up Dr. Bahnsen's
21 list of risk factors for renal cell carcinoma, the slide he
22 used on his direct testimony?

23 BY MR. DOUGLAS:

24 Q. And, sir, do you see, right here -- excuse me -- it
25 says: "Risk factors for kidney cancer."

1 This is a slide that we used --

2 A. I see that.

3 Q. -- for Dr. Bahnsen's direct testimony when he was
4 sitting right in that chair. And you see all these risk
5 factors that he listed --

6 A. Yes, but in his discussion --

7 Q. Yes or no? Do you see all these risk factors?

8 A. I see the list.

9 Q. We're talking about his testimony at trial, right?

10 A. In his testimony, he dismissed obesity as a --

11 MR. MACE: He won't let the witness --

12 THE COURT: Wait. Wait. There's two problems here.

13 There is two problems here. First of all, you're interrupting
14 the witness. But some of these questions are pretty simple.
15 There will be an opportunity for Mr. Mace to ask you some
16 additional follow-up questions. So please stay with the
17 limited questions being asked.

18 Re-ask the question.

19 MR. DOUGLAS: Yes, sir.

20 BY MR. DOUGLAS:

21 Q. Do you see the number of risk factors that Dr. Bahnsen
22 described for our jurors and displayed on this chart? Do you
23 see them?

24 A. He listed these on the chart. This isn't what he
25 described.

1 Q. As known risk factors, right?

2 A. This is what he listed as -- the risk factors that have
3 been reported is not what he described.

4 Q. Sir, do you see where it says obesity is one of the risk
5 factors, on Dr. Bahnsen's slide, in a slide of risk factors for
6 renal cell carcinoma?

7 A. I --

8 Q. Do you see it? Yes?

9 A. Yes. It's on his list of risk factors.

10 Q. Thank you.

11 And so you understand that all that Dr. Bahnsen is
12 saying with respect to obesity is -- and I think I'm going to
13 get at what you're saying -- he doesn't consider this a major
14 risk factor, a serious risk factor, for renal cell carcinoma
15 based on his 30 years of practice, based on all the articles
16 that he's kept abreast over the many decades in the scientific
17 literature? You understand that's all he said? That's his
18 opinion?

19 A. His opinion was that he didn't think -- was -- he did
20 not refer to any articles

21 Q. Sir, I didn't ask you about articles.

22 Are you sure you read his testimony?

23 A. I read his testimony.

24 Q. Did you read the part where he testified that he has
25 read and kept abreast of all the literature, including the

1 literature on renal cell carcinoma on obesity? Both at this
2 trial he testified to that and at his deposition, which you
3 also read.

4 MR. MACE: Objection.

5 MR. DOUGLAS: Did you miss that part?

6 THE COURT: Overruled.

7 THE WITNESS: I'm sorry?

8 BY MR. DOUGLAS:

9 Q. Did you miss that part of his testimony?

10 A. Would you ask it again?

11 Q. Did you miss the part of the testimony where he told our
12 jurors that he has kept abreast of the scientific literature,
13 that it's extremely important, or words to that effect, and
14 that he has kept abreast of the literature with respect to the
15 causes of renal cell carcinoma, because that's what he does for
16 a living? He saves people's lives. And did you read that part
17 of the testimony where he said he kept abreast of the
18 scientific literature?

19 A. I did see that that's what he said.

20 Q. And that he's read the scientific literature with
21 respect to obesity and renal cell carcinoma and testified he is
22 not very impressed by it because, he said, it is flawed by many
23 well-known limitations in epidemiology? Did you read that part
24 of his testimony?

25 A. I did see that in his testimony.

1 Q. Thank you.

2 So, all he's saying is, based on his review of the
3 literature and his years of experiences, he doesn't put a lot
4 of merit into those folks who say obesity, like yourself, is a
5 cause of renal cell carcinoma. He disagrees with that. That's
6 all he's saying, right?

7 A. That's what he's saying.

8 Q. And you disagree with it.

9 A. And I disagree vehemently.

10 Q. Strongly disagree with it, right?

11 A. I strongly disagree with it.

12 Q. Okay. And doctors and scientists disagree all the time,
13 right?

14 A. We do disagree. And usually that means that it's based
15 on sound science.

16 Q. Just answer my question yes or no.

17 A. I did. It has to be explained further.

18 Q. You can answer my question yes or no. And the question
19 is, scientists and medical doctors disagree all the time? If
20 you can't answer that with a yes or no, let us know that you
21 can't.

22 A. The disagreement has to be based on sound science.

23 Q. Okay. And you have an opinion that your position about
24 obesity is based on sound science and that Dr. Bahnson's
25 opinion is not based on sound science. Is that it in a

1 nutshell?

2 A. That's a nutshell.

3 Q. Okay. So, we talked about the fact that you're not an
4 oncologist or epidemiologist. Let's talk about some of the
5 things that you do do and that you are.

6 If I can switch gears, you testify in court. You get
7 involved in litigation cases, right?

8 A. I have in some, yes.

9 Q. That's something you do. And you've made hundreds of
10 thousands of dollars doing it, right?

11 A. Over a span of about ten years, yes.

12 Q. Okay. And, in fact, you've testified several times for
13 the company that makes the drug Actos, right?

14 A. That's correct.

15 Q. So you've testified for pharmaceutical companies, right?

16 A. Yes.

17 Q. Okay. And they were the companies, in those cases when
18 you testified, that were getting sued, right?

19 A. Correct.

20 Q. And they were getting sued by folks who had cancer. And
21 the claim was that the drug caused their cancer, right?

22 A. That's correct.

23 Q. And you came to court and/or deposition or wrote a
24 report saying the drug didn't cause their cancer, right?

25 A. In most of the instances, yes. Not always.

1 Q. Every time you've testified in an Actos case -- how many
2 times?

3 A. In an Actos, yes.

4 Q. Have you ever testified in court and said that the
5 defendant's drug or chemical was a cause of the claimed injury?

6 A. Not in court. When I've said that, it hasn't gone to
7 court.

8 Q. My question is court, sir.

9 A. Not in court.

10 Q. Okay. And, sir, you've also testified for DuPont in
11 that kidney cancer case, right?

12 A. Correct.

13 Q. That was a case pending in Tampa, Florida. And you
14 testified, in 2010, just about five years ago. You testified
15 for DuPont, right?

16 A. That sounds like about the right time frame.

17 Q. So this isn't the first time you've done work for
18 DuPont, right?

19 A. That's correct.

20 Q. Okay. And that was the Ramirez vs. DuPont case, right?

21 A. That sounds familiar, yes.

22 Q. Okay. And you went -- you came to court, just like you
23 came to court, and said essentially the same, identical thing.
24 You claim that obesity was a cause of cancer and that the
25 chemical manufactured by DuPont, which was not C-8 -- that the

1 chemical had nothing to do with this person's kidney cancer.
2 It was a farmer that was using pesticides. Does that sound
3 about right?

4 A. I testified that I was -- that his chemical exposure was
5 not -- I did not get into obesity in that case.

6 Q. Oh, really. Okay. Well, I understand it's five years
7 ago, but didn't you testify --

8 MR. DOUGLAS: Where is the transcript?

9 BY MR. DOUGLAS:

10 Q. It's the Ramirez case, vs. E.I. du Pont, Case No.
11 8:09-cv-321, 10th of September, 2010, Tampa, Florida. You
12 testified on that date at 9:24 a.m. Do you remember that?

13 A. Yes.

14 Q. And do you remember testifying, sir, that the chemical
15 manufactured by DuPont had nothing to do with what caused
16 Mr. Ramirez's kidney cancer, of which he ultimately died? Do
17 you remember testifying to that?

18 A. I don't remember that he died, but I do remember that I
19 testified that the chemicals that he was exposed to didn't
20 cause the two tumors that he had.

21 Q. And, sir, you argued that his obesity was the cause, or
22 contributed -- let me phrase it the way you phrased it.

23 You argued in that case, specifically, that obesity can
24 cause cancer and that -- and you argued that it contributed to
25 the plaintiff's cancer in that case, as opposed to the DuPont

1 chemical in that case, right?

2 A. Correct.

3 Q. Doctor, you look at a couple thousand pathology slides a
4 year, right?

5 A. Cases, yes. Probably tens of thousands of slides.

6 Q. Okay, cases. So you looked -- and you told me, at your
7 deposition, and I believe it was in March -- that you looked
8 at -- you had 2,300 pathology reports last year, in other
9 words, 2014?

10 A. Yes.

11 Q. Twenty-three hundred reports?

12 A. Approximately, yes.

13 Q. Okay. And at least 50 to a hundred times, in your
14 report, you opined as to the cause of a patient's -- of a
15 person's cancer, right?

16 A. Correct.

17 Q. And, sir, you do do that? You do opine with respect to
18 cause on occasion, at least 50 to a hundred times last year
19 alone, right?

20 A. Correct.

21 Q. And you have never written and reported in any pathology
22 report that obesity was the cause of anybody's cancer; is that
23 right?

24 A. I have not put that in any pathology reports.

25 Q. Sir, the only time you've ever opined that obesity is a

1 cause of cancer, or cause of someone's cancer, was in
2 litigation as an expert like right here or like right in the
3 Ramirez case, right?

4 A. Also --

5 Q. Not also. That's just yes or no.

6 A. No, it's not the only time. I've also -- I've also done
7 it in some panels on kidney cancer that I've been a part of.

8 MR. DOUGLAS: Can we play page 114, lines 1 through 7,
9 please?

10 BY MR. DOUGLAS:

11 Q. Now, my question is, do you recall being asked this
12 question and giving this answer that Mr. Wolfe is going to play
13 for us now.

14 (Thereupon, the following video clip was played:)

15 Question: If I understand correctly, the only time
16 you've ever opined that obesity had something to do with
17 someone's cancer is when you were hired as an expert to testify
18 in litigation; is that true?

19 Answer: Yes.

20 BY MR. DOUGLAS: (Continuing)

21 Q. Do you recall giving that answer to that question?

22 A. I do. It was --

23 Q. Yes or no, that's all I'm asking.

24 A. I recall that answer.

25 Q. Yes or no, sir?

1 A. It was incorrect at that time.

2 MR. MACE: Your Honor, can he be allowed to explain
3 his answer?

4 THE COURT: Well, he'll have to give a yes or no
5 first.

6 Let's go back. Re-ask the question.

7 Yes or no, and then take your time to explain your
8 answer.

9 BY MR. DOUGLAS:

10 Q. Sir, did you give that answer to that question at your
11 deposition that we just heard just now?

12 A. Yes.

13 Q. Thank you.

14 A. Can I explain now?

15 Q. Yes.

16 A. I was wrong at that time because I had forgotten the
17 times I'd been on kidney cancer panels where I'd also discussed
18 the issue of obesity.

19 Q. Did there come a time that you received your transcript
20 to review?

21 A. Yes.

22 Q. Did you make a correction to that, to that wrong answer?

23 A. I was told only to make corrections of spelling and
24 grammar, not on content. So, I didn't change the content.

25 Q. Who told you that?

1 A. That's what I've been told whenever I've corrected
2 transcripts.

3 Q. How many times have you testified at a deposition?

4 A. Probably a half a dozen or so.

5 Q. And trial?

6 A. Counting this one, it would be seven or eight.

7 Q. How many litigation cases have you reviewed, over the
8 course of your years, where an individual has sued a company,
9 or whatever, and you were asked -- how many cases have you
10 looked at, individual cases?

11 A. Probably 15 to 20, of which I've been on the defense
12 most of the time, but on the plaintiff once.

13 Q. Once. I'm not surprised.

14 Sir --

15 MR. MACE: Your Honor, objection.

16 THE COURT: Wait. Wait. That's a -- that last
17 comment, that was not a question.

18 BY MR. DOUGLAS:

19 Q. Sir, and every time you've testified in court, it's been
20 for a defendant like DuPont or the company Takeda, that makes
21 Actos, right?

22 A. In court, it's been for the defense, correct.

23 Q. How much -- you said you're charging 600 an hour?

24 A. That's my current rate, yes.

25 Q. And what other work have you done for DuPont besides

1 coming to court and testifying that obesity causes cancer and
2 it wasn't -- and it wasn't the chemicals -- that obesity causes
3 cancer and it wasn't the chemicals made by DuPont? How
4 many -- how many -- how much work have you done for them?

5 A. As I can remember, I've been involved with two research
6 projects that were sponsored by DuPont.

7 Q. I'm sorry. I didn't hear the answer.

8 A. That I can remember, I've been involved with two
9 research projects that were sponsored by DuPont.

10 Q. Okay. And they paid you for that, right?

11 A. They paid the university for that. I did not --

12 Q. But you did the work?

13 A. My laboratory and I did the work, yes.

14 Q. And raising revenue -- when you say -- hear me out.

15 When you say they paid the university, that's an important part
16 of university life, of academia. When you're a professor, it's
17 important that you raise money to justify your existence, for
18 lack of a better way to say it, for the university, right?

19 A. Most of what I have to justify is for -- from clinical
20 duties, where I raise most of the monies. Research is
21 essentially an add-on that, fortunately, I've been able to
22 raise a fair amount with research, but it's not required.

23 Q. Sir, I don't believe you mentioned -- now, we heard that
24 Dr. Bahnsen was the chair of the urology department over at
25 James Cancer Hospital for a number of years. You were a

1 department chair at one point at your university, right?

2 A. Correct.

3 Q. And then you were asked to step down?

4 A. The dean and I concluded that it was time for me to step
5 down because we disagreed on the direction things were going.

6 Q. Yeah. You were not appreciated by the dean of the
7 school, and it was -- you were either going to be discharged or
8 you voluntarily step down. And that's what you've said in open
9 court in these Actos trials, right?

10 A. No. What I've said is that the dean and I, after
11 discussion, decided that it was best for someone else to become
12 chair. Basically, I was --

13 Q. Let's put it this way: The dean and yourself didn't see
14 eye to eye for over a year, and it became obvious that it was
15 time for you to resign, right?

16 A. That's correct.

17 Q. And you resigned so that the university would avoid the
18 embarrassment of taking away your chairmanship, right? I mean,
19 that's how it worked?

20 A. That's not correct.

21 Q. Now, before you came here to court, did you spend some
22 time meeting with the lawyers for DuPont?

23 A. Yes.

24 Q. And before you came to testify at your deposition in
25 March, you spent some time meeting with the lawyers for DuPont,

1 right?

2 A. Yes.

3 Q. And how much time have you spent, since your deposition,
4 speaking with and/or meeting with DuPont lawyers?

5 A. I've spoken, by phone, with them probably 15 to 30
6 minutes over several phone calls because they were very brief
7 requests for information. And then, last night, we spent about
8 an hour and a half together.

9 Q. Where was that?

10 A. At the -- one of their offices, I believe.

11 Q. And where are you staying? You are staying in town, I
12 assume.

13 A. I'm staying at the Courtyard Hotel.

14 Q. And are they paying for your hotel?

15 A. Yes.

16 Q. Do you get to eat meals on their expense account?

17 A. Not very good meals, but some meals, yes.

18 Q. There are some great places here in Columbus to eat.

19 A. I haven't had the opportunity.

20 Q. Before your deposition, you spent some time with the
21 lawyers, right? You went over -- with the lawyers for DuPont,
22 that is, right?

23 A. Yes.

24 Q. And you talked to them about your report, right?

25 A. Yes.

1 Q. You talked about what should be in the report and not in
2 the report, right?

3 A. They gave me a broad outline of what they thought I
4 needed to address in the report, yes.

5 Q. Okay. And so you spent time speaking with them before
6 your report and before your deposition, right?

7 A. Yes.

8 Q. How many hours did you spend in preparation for your
9 deposition testimony?

10 A. With the attorneys?

11 Q. With the lawyers for DuPont.

12 A. With the lawyers for DuPont, a few hours. I don't
13 remember exactly.

14 Q. On how many occasions?

15 A. I believe we met either the day before or the morning of
16 the deposition. I don't remember exactly, but for a few hours.
17 Other times, it was by phone, because I needed to get some
18 additional information.

19 Q. Okay. So you've had an ongoing dialogue with the
20 lawyers from DuPont, right, about the case?

21 A. Generally, sure.

22 Q. And how many lawyers did you meet with last night?

23 A. Mr. Mace and Mr. Fazio.

24 MR. DOUGLAS: Okay. May I have a moment to confer
25 with my colleagues?

THE COURT: You may.

2 MR. DOUGLAS: Thank you.

3 (Whereupon, there was a brief interruption.)

4 MR. DOUGLAS: Now, sir, those are all the questions I
5 have for you for now. I'm going to --

6 THE COURT: Thank you, Mr. Douglas.

7 MR. DOUGLAS: I'm going to clear out some space for
8 you, Mr. Mace, and turn him back to you.

9 MR. MACE: May I proceed, Your Honor?

10 THE COURT: You may proceed.

11 MR. MACE: Thank you, sir.

12 | - - -

REDIRECT EXAMINATION

14 BY MR. MACE:

15 Q. Doctor, there's only one profession with worse
16 handwriting than doctors', and that's attorneys.

17 Can you see or, more importantly, read what I've written
18 on the board, sir?

19 A. Yes.

20 Q. Is there a difference between those terms?

21 A. Yes.

22 Q. What is it?

23 A. Etiology is cause. Diagnosis is the name of the disease
24 or what -- the disease the person has. And the treatment is
25 how the patient is going to be taken care of.

1 Q. In terms of your expertise, what is it that's different
2 about your expertise than Dr. Bahnsen's expertise on those
3 terms?

4 A. I specialize scientifically on etiology, clinically on
5 diagnosis. He specializes clinically in diagnosis and
6 treatment. And that's also his area of research, is primarily
7 in treatment and biomarkers, which is another issue.

8 Q. And are you criticizing Dr. Bahnsen, at all, in terms of
9 his diagnosis of what disease Mrs. Bartlett had or his
10 treatment of that disease?

11 A. No.

12 Q. Okay. Is your -- is your point more in terms of the
13 specific expertise on etiology and cause?

14 A. Correct.

15 Q. Okay. Counsel asked you some questions about Von
16 Hippel-Lindau disease. Do you need to have Von Hippel-Lindau
17 disease to have faulty genes that can cause kidney cancer?

18 A. No.

19 Q. You talked to us about the VHL gene?

20 A. Correct.

21 Q. And you can have defects in that gene without having Von
22 Hippel-Lindau disease?

23 A. Correct. Basically, as you're DNA is replicating, it's
24 going to make mistakes. And occasionally those mistakes will
25 be in the VHL gene. And if both aspects occur in a kidney

1 cell, then you'll get kidney cancer.

2 Q. Did you understand that DuPont had retained a number of
3 different experts to do a number of different things in the
4 case?

5 A. Yes.

6 Q. Did you understand your scope to be looking at specific
7 causation for kidney cancer?

8 A. Correct.

9 Q. And did you understand that different experts were doing
10 different things?

11 A. Yes.

12 Q. Did you read the part of Dr. Weed's testimony where he
13 said it wasn't within the scope of his assignment to analyze
14 the relationship between obesity and kidney cancer?

15 A. Yes.

16 MR. MACE: Your Honor, may we have a side-bar,
17 briefly?

18 THE COURT: Yes.

19 You may stand if you wish, ladies and gentlemen.

20 (Discussion at side-bar as follows:)

21 MR. MACE: Your Honor, I think counsel has opened the
22 door to a number of things, among them -- I would intend to ask
23 the following two questions and followups if the Court allows
24 it: Sir, did you understand counsel to be saying that if the
25 peer-reviewed literature only refers to an association, that

Vol. 12 - 261

1 factor can be disregarded as a cause, to which I anticipate he
2 will say yes. Are you aware of any peer-reviewed literature
3 that refers to C-8 as a cause of kidney cancer, to which I
4 think he'll say no.

5 MR. DOUGLAS: That's clearly off the radar.

6 THE COURT: The second question, I'm not going to
7 permit.

8 The first one, is that a prelude to the second one?

9 MR. MACE: It is, Your Honor, to show -- if I could
10 just make my record -- to show that -- counsel, as they did
11 with their expert, is trying to use two completely different
12 methodologies, one to analyze obesity and a completely
13 different one to analyze C-8.

14 THE COURT: Well, because this is not -- in other
15 words, we've let in other issues about standards besides the
16 .05 parts per billion, but that was only with regard to
17 DuPont's conduct.

18 This witness has next to -- he said a little bit about
19 DuPont's conduct, but not in regard to these two questions. So
20 I find the door has not been opened.

21 MR. MACE: Okay.

22 (Back in open court.)

23 BY MR. MACE:

24 Q. Sir, counsel cut off some of your answers. I wanted to
25 find out what your answer was going to be on a few of them.

1 Have you ever given an opinion to a defendant, somebody
2 who is a defendant in a lawsuit, that you thought their
3 chemical caused the disease?

4 A. Yes, I have.

5 Q. Okay. Now, the Ramirez case, was the chemical at issue
6 C-8?

7 A. No.

8 Q. Okay. You say you've been involved in tumor board
9 panels. What are those?

10 A. Tumor boards are where various clinicians who are
11 involved with a particular case or type of case get together
12 and discuss the clinical management of the individual patient.
13 So, for a urologic pathology, the urologist, the pathologist,
14 the radiologist, radiation therapist and medical oncologist
15 will all be there, along with residents and fellows, to discuss
16 how to manage cases.

17 Q. And in the practice of your medicine and your research
18 outside of courtrooms, outside of the litigation field, do you
19 regularly participate in those types of boards and have you
20 over the years?

21 A. Yes.

22 Q. And on those boards outside of litigation context, have
23 you had discussion and given the opinion that obesity was the
24 cause of kidney cancer?

25 A. Yes.

1 Q. Okay. And did you, in fact, talk about the tumor boards
2 at your deposition, page 110?

3 A. I don't remember, but I may have.

4 Q. All right. Counsel asked you about Bahnsen's testimony.

5 MR. MACE: Could we bring up page 152 of the morning
6 two transcript, September 22nd?

7 BY MR. MACE:

8 Q. Among the testimony you reviewed from Dr. Bahnsen, did
9 you review this testimony: Your personal opinion is that
10 smoking is not a risk factor for kidney cancer? True. Your
11 personal opinion is that hypertension is not a risk factor for
12 the development of kidney cancer? True. Your personal opinion
13 is that obesity is not a risk factor for kidney cancer? True.

14 Was that the testimony you're referring to?

15 A. That's what I was trying to say, yes, is that, even
16 though he listed them, he basically dismissed them.

17 Q. Okay. Counsel showed you an article. Before I go
18 there, in your discussion with me on direct examination, did
19 you mention the fact that there were 20 to 25 studies, and all
20 but one of them showed a statistically significant relationship
21 between kidney cancer and obesity?

22 A. Yes, a very consistent finding in the literature.

23 MR. MACE: Could I get the ELMO, please?

24 BY MR. MACE:

25 Q. All right. Counsel showed you this study, and you said

1 that's the exception?

2 A. Correct.

3 Q. This is a '93 study?

4 A. Yes.

5 Q. Whereas the ones we were going through on direct are
6 2006, 2009, 2010 and later?

7 A. Correct.

8 Q. And this has to do with thiazide?

9 A. Yes. This is a diuretic that's used in the treatment of
10 hypertension. And, since this study, it's been questioned
11 whether it's the thiazide or the hypertension that was really
12 the risk factor that was involved here. And most people now
13 conclude it's the hypertension, and not the thiazide.

14 Q. In any event, you've seen Mrs. Bartlett's medicines
15 list?

16 A. Yes.

17 Q. And did you see thiazide on there anywhere?

18 A. It -- not recent -- I don't remember it being there, no.

19 Q. All right. In terms of the size of these studies, you
20 were showing us things with many thousands.

21 Ninety women involved in this?

22 A. Correct.

23 Q. Okay. Is that a small, or a large, study?

24 A. It's small. And, also, it's a case-control study. So
25 this is a retrospective analysis, not prospective. And

1 prospective are much more -- provide much stronger evidence
2 than the retrospective study.

3 Q. All right. We're not going to take the time to explain
4 that right now.

5 Counsel showed you the American Cancer Society renal
6 cell carcinoma overview.

7 A. Yes.

8 Q. And he referred you to the page, but he didn't show you
9 the language.

10 What are the risk factors for kidney cancer? Lifestyle,
11 body weight. A very overweight person has a higher risk of
12 getting kidney cancer. Right?

13 A. Correct.

14 Q. American Cancer Society. Do we know what causes kidney
15 cancer? Risk factors for kidney cancer, and the same
16 statement: People who are very overweight have a higher risk
17 of developing renal cell cancer, true, --

18 A. True.

19 Q. -- in your opinion?

20 A. It's listed under their section on cause.

21 Q. And counsel made a timing. Was that published within
22 the last week or so?

23 A. Yes.

24 Q. I'm losing track of the days, but -- National Cancer
25 Institute, do you recognize them as an authoritative source?

1 A. Yes.

2 MR. DOUGLAS: Objection. Outside the scope.

3 THE COURT: You'll have an opportunity. The objection
4 is overruled. You get the last shot here.

5 BY MR. MACE:

6 Q. National Cancer Institute, September of '15. What is
7 known about the relationship between obesity and kidney cancer?
8 Obesity has consistently -- has been consistently associated
9 with renal cell cancer, which is the most common form of kidney
10 cancer.

11 Now, consistency, was that one of the things that you
12 said is important in terms of the Bradford Hill criteria and
13 making a causal statement?

14 A. Yes. Consistency is one of his criteria.

15 Q. Okay.

16 The Hakimi study, you've looked at that?

17 A. Yes.

18 Q. Do you consider that authoritative?

19 A. It's a very good study, yeah.

20 Q. 2013, right? Fairly recent?

21 A. Yes.

22 Q. Obesity increases risk for clear-cell renal cell
23 carcinoma, right?

24 A. Yes.

25 Q. More than 40 percent of renal cell cancers attributable

1 to obesity as measured by body mass index. These processes can
2 both induce and promote carciogenesis. It talks about the
3 mechanism of action, right?

4 A. Correct.

5 Q. Attributable. What does attributable, in the context of
6 these studies, mean?

7 A. Attributable refers to how many cases would be caused by
8 that factor. So, in this case, it's obesity.

9 Q. Macleod, are you familiar with this article?

10 A. Yes.

11 Q. Consider it authoritative?

12 A. Yes.

13 Q. Now, it says: Confirmed several previously identified
14 risk factors for renal cell cancer, including obesity, right?

15 A. Yes.

16 Q. More importantly, obesity and smoking are commonly
17 linked to several cancers, including renal cell cancer. In
18 this study, morbidly obese individuals, BMI 35 or greater, were
19 at 71 increased risk for renal cell cancer compared to normal
20 weight individuals.

21 Now, first of all, do you agree with that?

22 A. Yes.

23 Q. And was Mrs. Bartlett above, or below, the 35?

24 A. She was between 40 and 41 at the time of diagnosis.

25 Q. So, the -- according to these statistics, it would be

1 even greater than the 71 percent?

2 A. Correct.

3 Q. Counsel was challenging you about the word "cause." We
4 already looked at this in your direct, right?

5 A. Correct.

6 Q. American Cancer Society. Additional risk factors
7 include obesity, which causes an estimated 30 percent of cases.

8 American Cancer Society using the word "cause"?

9 A. Correct.

10 Q. We don't need to keep going through these, sir.

11 Despite counsel's questioning, does it remain your
12 opinion, to a reasonable degree of medical certainty and
13 scientific certainty, that obesity is a cause of renal cell
14 cancer?

15 A. Yes.

16 Q. And do you stand by your opinions where you were
17 critical not of Dr. Bahnsen's diagnosis and treatment but about
18 his etiology opinions?

19 A. Yes.

20 MR. MACE: Nothing further at this time. Thank you.

21 THE COURT: Thank you.

22 Recross examination.

23 MR. DOUGLAS: Just a few.

24

25

1

- - -

2

RECORDS-EXAMINATION

3

BY MR. DOUGLAS:

4

5

6

Q. You did make a distinction between the two terms, earlier today, in my questioning, between risk factor and causative risk factor. Do you remember our discussion on that?

7

A. Yes.

8

9

10

11

12

13

Q. Okay. And just to get back to the American Cancer Society, September 29, 2015 -- I think that was yesterday -- it might have been this morning -- we've been here awhile -- it says -- it does say: We do not yet know exactly what causes kidney cancer. But we do know that certain risk factors are linked to the disease. Do you see that?

14

A. Yes.

15

MR. DOUGLAS: May I approach the board?

16

THE COURT: You may.

17

BY MR. DOUGLAS:

18

Q. So, your expertise is etiology, right, --

19

A. Yes.

20

Q. -- if you do say so yourself? You're an expert in etiology, with all modesty?

22

A. I have written many times on it.

23

Q. And you're saying that, Dr. Bahnsen, he is not an expert in etiology, right?

25

A. Correct.

1 Q. You did not, speaking of etiology -- and etiology is
2 what is the cause, right?

3 A. Correct.

4 Q. You did not render an opinion on your direct examination
5 --

6 MR. MACE: Objection, Your Honor.

7 THE COURT: One- or two-word basis?

8 MR. MACE: Can we approach?

9 THE COURT: I'll see you at side-bar.

10 You may stand by your seats, ladies and gentlemen.

11 (Discussion at side-bar as follows:)

12 MR. MACE: Your Honor, he's about to ask him, I take
13 it, you didn't render an opinion on direct examination that
14 Mrs. Bartlett's kidney cancer was caused by her obesity. That
15 clearly is his opinion.

16 MR. DOUGLAS: That's not quite what I was going to
17 say.

18 THE COURT: What were you going to ask?

19 MR. DOUGLAS: I was going to ask, you're an expert on
20 etiology, but you didn't render an opinion on a cause of this
21 person's cancer.

22 And let me point out that is exactly what's in the
23 Court's instruction. So how could that -- how could that
24 possibly be prejudicial or improper?

25 MR. MACE: Because it implies that he doesn't have an

1 opinion. He clearly has a very strong opinion, which we
2 believe he should be allowed to give. And we think you're
3 opening the door to that if you ask that question.

4 MR. DOUGLAS: But the fact that his opinion is not
5 admissible is not my doing. It's his doing.

6 THE COURT: It's not that he doesn't have one.

7 Wait.

8 He didn't give one. He has one. He wasn't allowed to
9 give it. So, I mean, at a minimum, I would require you to say
10 that.

11 MR. DOUGLAS: That's how I'll phrase it: that he did
12 not opine as to the cause on direct examination.

13 THE COURT: That actually is covered in my
14 instruction, more or less, that they've already heard.

15 MR. DOUGLAS: I think I'm entitled to make that point
16 through the witness who is on the witness stand who has gone on
17 about how he's an expert.

18 MR. MACE: It's not an issue in dispute in the case,
19 Your Honor, much like some of your rulings on causation that
20 you haven't let us get into because it's not a fact in dispute
21 in the case, because you have ruled it out.

22 MR. DOUGLAS: It's a fact as to what occurred on
23 direct examination.

24 THE COURT: Well, he -- you know, the thing is, he
25 gave a lot of testimony about obesity; but he hasn't given

Vol. 12 - 272

1 testimony on an opinion because I excluded it. So you can ask
2 he hasn't given. Don't imply that he doesn't have one, though.

3 MS. NIEHAUS: Doesn't the question imply that he
4 doesn't have one, though?

5 MR. MACE: It sure does.

6 THE COURT: No. No. That's what we're going to do.

7 (Back in open court.)

8 BY MR. DOUGLAS:

9 Q. Getting back to etiology, you're the expert in etiology,
10 if you do say so yourself, right?

11 A. I am an expert, yes.

12 Q. Okay. You did not render an opinion -- you did not give
13 an opinion on direct examination as to what the etiology was
14 of --

15 THE COURT: Give, not render. Rephrase the question.

16 BY MR. DOUGLAS:

17 Q. You did not give an opinion on direct examination as to
18 what was the etiology, in your area of expertise, of
19 Mrs. Bartlett's cancer, did you? Yes or no?

20 A. No.

21 Q. You did not give an opinion on redirect examination with
22 respect to the etiology of Mrs. Bartlett's cancer, right?

23 A. That's correct.

24 MR. DOUGLAS: Those are all the questions I have.

25 THE COURT: Thank you, Doctor. You may step down.

1 Who is your next witness?

2 MR. MACE: The defendant calls Dr. Bruce Karrh by
3 video deposition.

4 MR. PAPANTONIO: Judge, may we have a side-bar?

5 THE COURT: Very briefly.

6 Again, you may stand if you wish, ladies and gentlemen.

7 (Discussion at side-bar as follows:)

8 THE COURT: When all of you ask for a side-bar, I
9 noticed the jurors are rolling their heads, seriously. So, I
10 mean, you know, if we could do these at breaks, I'd prefer it,
11 but let's go ahead.

12 MR. PAPANTONIO: The only reason I think I have to do
13 it now, Judge, I just want to put on the record the issue that
14 we raised already. I'm moving to strike this testimony. This
15 issue was already out on summary judgment. It was ruled out on
16 summary judgment.

17 The doctor's testimony didn't rise to Daubert quality of
18 admissibility at pretrial. The plaintiffs were fatally
19 prejudiced by not being permitted to address this testimony by
20 our own experts.

21 THE COURT: You're going to have to back me up here.
22 It's a long day in the trial here.

23 MR. MACE: He's just repeating what he said --

24 THE COURT: Yeah, but I want to know, the witness
25 we're talking about is going to say what?

1 MS. NIEHAUS: He's talking about Dr. Cohen.

2 MR. MACE: He is talking about this witness. He's
3 just repeating what he said.

4 THE COURT: I'll incorporate all of your remarks then
5 to now --

6 MR. PAPANTONIO: Okay. That's fine.

7 THE COURT: -- and make the same ruling as I did then.

8 MR. PAPANTONIO: Okay. That's fine. I simply didn't
9 know what the Court's preference was.

10 THE COURT: Thank you.

11 (Back in open court.)

12 THE COURT: You may proceed.

13 I mentioned to you the very first day, if we knick 20
14 minutes here, 20 minutes there, you'd be here a few extra days.
15 So, I know you don't prefer that. So we'll go right up to
16 five, if you don't mind. So, with that, you may continue to
17 see part of this deposition.

18 MR. MACE: Yes. I think it's only 37 minutes, or
19 thereabouts, Dr. Bruce Karrh.

20 THE COURT: Yeah. I don't think we're going to finish
21 it. We're going to go right up to five o'clock.

22 Okay. You may proceed.

23 (Thereupon, the video deposition of Bruce Karrh was
24 played as follows:)

25 - - -

1

BRUCE KARRH,

2

Having been first duly sworn as prescribed by law, was
examined and testified as follows via deposition:

4

- - -

5

CROSS-EXAMINATION

6

BY MR. BILOTT:

7

Q. Would you state your name, please?

8

A. Bruce Karrh.

9

Q. Is that Dr. Bruce Karrh?

10

A. Yes. I have an M.D. degree.

11

Q. During what period of time were you employed by DuPont?

12

A. I was employed two different times. I first went to
work --

14

MR. MACE: Could you turn the volume up?

15

THE COURT: If you'd like, you can start it again.

16

Q. Would you state your name, please?

17

A. Bruce Karrh.

18

Q. Is that Dr. Bruce Karrh?

19

A. Yes. I have an M.D. Degree.

20

Q. During what period of time were you employed by DuPont?

21

A. I was employed two different times. I first went to
work for DuPont in 1958, probably the end of May of 1958, until
the 1st of September of 1958, as a laboratory technician at the
Birmingham, Alabama, plant. Then I was reemployed by DuPont
August the 1st of 1970, and was a full-time employee of DuPont

1 until March 31st of 1996.

2 Q. You say a full-time employee until March 1st of '96.
3 Did you maintain any sort of employment relationship with
4 DuPont after March 1st of 1996?

5 A. Not as an employee.

6 Q. In what way did you maintain any sort of relationship
7 with DuPont?

8 A. I have served as a consultant a few times for DuPont.

9 Q. What position did you hold with DuPont at the time that
10 you retired?

11 A. I was vice president, integrated health care.

12 Q. You were a corporate medical director for DuPont,
13 correct?

14 A. At one point in time.

15 Q. During what period of time?

16 A. From 1977 -- April, I think it was, of 1977, until April
17 of 1983.

18 Q. How did you first learn about your deposition today?

19 A. I was informed by counsel that I was to be deposed.

20 Q. Who was that?

21 A. It was an in-house counsel with DuPont, a gentleman
22 named John Bowman.

23 Q. Was this through a telephone conversation, or written
24 communication of some sort?

25 A. Telephone conversation.

1 Q. When was that; do you recall?

2 A. No, I don't.

3 Q. Was it within the last year?

4 A. Yes.

5 Q. Do you know whether anybody else other than Mr. Bowman
6 was on the telephone with you during that particular
7 conversation?

8 A. To my knowledge, during that conversation no one else
9 was on the phone except Mr. Bowman.

10 Q. At that particular point in time, were you employed by
11 DuPont?

12 A. No.

13 Q. Had you asked Mr. Bowman to serve as your counsel during
14 that -- when he called you on that particular date?

15 A. Not at that point in time.

16 Q. What did Mr. Bowman tell you during that telephone
17 conversation?

18 A. He just told me that I was to be deposed in the case
19 that you referenced earlier and that they were looking for a
20 date and wanted to know what my availability was, what my dates
21 of availability were that might coincide with when the
22 deposition would be taken.

23 Q. And did he mention what the case was you were requested
24 for a deposition in?

25 A. Not by a title. He mentioned what it involved.

1 Q. And what did he say it involved?

2 A. It involved a particular chemical substance, and it
3 involved a situation in West Virginia and Ohio.

4 Q. And what particular chemical substance were you told it
5 involved?

6 A. A material that's called C-8, ammonium
7 perfluorooctanoate.

8 Q. How many such conversations had you had with Mr. Bowman
9 prior to this particular telephone when he called to tell you
10 you had been requested for a deposition?

11 A. I don't recall.

12 Q. More than one?

13 A. Yes, more than one.

14 Q. More than a dozen?

15 A. Mr. Bowman was DuPont in-house counsel that I had worked
16 with while I was working. We had a lot of other situations
17 where he and I had worked together. We had many conversations
18 over the years involving a lot of different things.

19 I don't recall specifically when he first mentioned to
20 me a C-8 lawsuit, but I know it was more than one. I don't
21 know if it was a dozen. It could have been two. It could have
22 been more than a dozen. I don't know.

23 Q. You mentioned you had had depositions before, right?

24 A. Yes.

25 Q. The most recent one being sometime earlier this year; is

1 that correct?

2 A. In January of '04.

3 Q. How many depositions have you participated in?

4 A. There have been several. I don't know an exact number.

5 Q. More than a dozen?

6 A. Yes.

7 Q. More than two dozen?

8 A. Yes.

9 Q. More than three dozen?

10 A. Yes.

11 Q. What's your best estimate?

12 A. In the deposition in January, I was asked the same
13 question. And I guessed around 50 at that time. This would
14 make 51.

15 Q. Were you ever compensated for your time during any of
16 the depositions that you gave?

17 A. Yes.

18 Q. How many times were you compensated?

19 A. I'm compensated every time that I am deposed.

20 Q. At what rate are you compensated?

21 A. First, I get a pension from DuPont as an earned pension
22 that all employees, if they reach a certain amount of service
23 and age, are entitled to. And so I get that pension. I also
24 get an hourly rate of compensation, and it's \$350 an hour, and
25 expenses.

1 Q. And are you getting paid that rate for a deposition here
2 today?

3 A. Yes, I am.

4 Q. And who is paying that rate?

5 A. The DuPont Company.

6 Q. Do you currently own any DuPont stock?

7 A. Yes, I do.

8 Q. How much stock?

9 A. I have about 3,000 shares now.

10 Q. Has the amount of your DuPont stock fluctuated in any
11 significant degree over the last -- since you left your
12 employment at DuPont?

13 A. The number of shares --

14 Q. Yes.

15 A. -- has decreased steadily, because I use that as ways to
16 fund my grandchildren's educations.

17 Q. I'd like to go back to the depositions. You mentioned
18 you've participated in some -- I guess is it fair to say more
19 than 50 depositions?

20 A. I would say approximately 50.

21 Q. Okay. Did any of those prior depositions involve
22 anything to do with any perfluorinated chemicals or materials
23 of any kind?

24 A. I don't recall any of them dealing with perfluorinated
25 chemicals.

1 Q. I may be able to try to speed through this a little.

2 Let me see if I understand this correctly.

3 You were a military physician for about three years?

4 A. Yes.

5 Q. And was that between about 1962 and 1965?

6 A. That's correct.

7 Q. And then where did you perform your services for the
8 military during that period of time?

9 A. Well, I was first at Brook General Hospital in San
10 Antonio, Texas, for a year. Then I went to the U.S. Army
11 Medical Field Service School, also in San Antonio, for two
12 months. Then I went to the U.S. Air Force School of Aerospace
13 Medicine, also in San Antonio, for three months.

14 Then I went to the U.S. Army School of Aviation Medicine
15 in Fort Rucker, Alabama, for a month. And then I went to the
16 U.S. Army Primary Helicopter School in Mineral Wells, Texas,
17 from November of '63 until July of '65.

18 Q. Any other licenses or certifications of any kind?

19 A. I'm board certified.

20 Q. In what?

21 A. In occupational medicine, by the American Board of
22 Preventive Medicine.

23 Q. And when did you first obtain that certification?

24 A. 1977.

25 Q. Have you maintained that certification since that time

1 continuously?

2 A. Yes.

3 Q. In 1973, you were transferred to DuPont's Haskell
4 Laboratory for Toxicology and Industrial Medicine as Research
5 Manager in Environmental Sciences, correct?

6 A. Yes.

7 Q. With responsibility for industrial hygiene and
8 physiological evaluations, correct?

9 A. Yes.

10 Q. And following your work at Haskell, you were named
11 Assistant Corporate Medical Director in 1974?

12 A. Correct.

13 Q. And held that position for three years before becoming
14 medical director for DuPont, correct?

15 A. That's correct.

16 Q. During the time that you were medical director for
17 DuPont between 1977 and 1983, were you the top person at
18 DuPont, so to speak, for making medical decisions?

19 A. I was considered the top corporate medical person within
20 the company as far as decisions or policies or what else was
21 concerned.

22 Q. And when you became vice president safety, health and
23 environmental affairs in 1984, were you still the top person at
24 DuPont for medical decisions?

25 A. Yes.

1 Q. What about when you became vice president integrated
2 health care? Were you still the top person at DuPont for
3 making medical decisions?

4 A. Yes.

5 Q. And you maintained that position from March of 1993
6 until when?

7 A. Until I retired in March, 31st, of 1996.

8 Q. Dr. Karrh, in your employment experience with DuPont,
9 did you become personally familiar with a chemical used by
10 DuPont known as C-8?

11 A. I have to ask you to define what you mean by personally.
12 I became familiar with that chemical.

13 Q. When did you first hear of that chemical, if you recall?

14 A. It was in the late seventies, '79, plus or minus, when I
15 first became aware of C-8.

16 Q. And is it fair to say that, during your employment
17 experience with DuPont, you were personally involved in the
18 medical decisions made by DuPont with respect to health hazards
19 --

20 A. Yes.

21 Q. -- from C-8?

22 A. Yes.

23 Q. How do you recall C-8 first coming to your attention?

24 A. The first recollection I have of it is when the supplier
25 of the chemical, the 3M Company, provided DuPont with some

Vol. 12 - 284

1 information that indicated that the particular chemical had --
2 on a test they had run on rats, looked like it may have caused
3 some eye abnormality in the rats that had been subjected to
4 exposure to the chemical.

5 Q. Dr. Karrh, I'm going to hand you what's been marked as
6 Exhibit 10 and ask you to take a moment to look at that, and
7 tell me if you can identify what that is.

8 A. This is a letter written from me to F. E. French, dated
9 June 16th, entitled "Fluorochemicals in Blood."

10 Q. And, in fact, this particular memo that you -- you
11 recognize that as your signature on the last page?

12 A. Yes.

13 Q. And a document you prepared while employed at DuPont?

14 A. Yes, it is.

15 Q. And you are providing a recommendation of some testing
16 to be done on DuPont workers based on information about
17 fluorochemicals in the blood, FC-143 in particular, correct?

18 A. That's correct, plus other unidentified fluorochemicals
19 in the blood.

20 Q. And, in fact, you say: "The medical division recommends
21 the following course of action for DuPont employees whose jobs
22 have potential for exposure to Telomer A and its non-polymeric
23 derivatives," right?

24 A. That's correct.

25 Q. Now, why were you making a recommendation to test

1 employees with potential exposure to the fluorochemicals?

2 A. I think the letter stands for itself. If you'd like,
3 I'll read the whole letter.

4 Q. I'm just asking for your recollection of why you made a
5 recommendation to test employees for exposure to
6 fluorochemicals.

7 A. The first sentence starts off: 3M has reported finding
8 FC-143 plus other unidentified fluorochemicals in the blood of
9 potentially exposed workers. And then it goes on: Similar
10 tests have not been done on the general population, and medical
11 division recommends the following with jobs with potential
12 exposure to Telomer A. And that's Number 5. And the main
13 reason was to see if our employees were showing the same thing
14 that 3M employees had shown.

15 Q. Based on the information you had that there was C-8
16 being detected in 3M worker blood, you made a recommendation to
17 test DuPont workers, right?

18 A. That's correct. It's in the previous -- .

19 Q. Knowing that this material was also in general
20 population blood, why was there no recommendation made to
21 follow up and do further testing of general population blood?

22 A. At that point in time, we were trying to determine if it
23 was in the blood of our workers who would have the highest
24 potential exposure to the material in the workplace.

25 Q. What disclosures did DuPont make to anyone with respect

1 to the data showing C-8 in general population blood?

2 A. I don't recall DuPont making any disclosure as far as
3 that because the general population data was already in the
4 published paper that you showed me earlier, the Taves paper,
5 and 3M -- reference here to 3M was based upon that, according
6 to your summarization of it. So, I don't see any -- I don't
7 think DuPont had any reason to do anything right then until we
8 got some more data.

9 Q. And, again, what data did DuPont have at that time in
10 1979 to inform DuPont as to what, if any, safe level existed
11 for having C-8 in human blood?

12 A. I don't think we had any data that told us what was safe
13 or what was not safe. We just had some data that was showing
14 us that C-8 was in the blood, and we were undertaking then a
15 pretty extensive program to try to determine exactly what that
16 did mean and what was the significance of it.

17 Q. Did you have any knowledge indicating that any copy of
18 the 1976 article from Taves had ever been given to U.S. EPA by
19 anybody?

20 A. I didn't have any knowledge that it did. I didn't have
21 any knowledge that it didn't. It was a published paper out in
22 the published literature.

23 Q. Why not err on the side of making sure EPA had that
24 information?

25 A. What would be the reason for that? It was a published

1 paper out in the public domain that EPA had signed, reviewed
2 the literature. They know everything that's coming out and
3 published. There would not have been any reason whatsoever to
4 go back and send that paper to the EPA, because it didn't
5 really say anything that EPA could use if they hadn't already
6 picked it up by their own scientists.

7 Q. You had no information indicating that EPA was aware of
8 that document?

9 A. No, but I don't know that they weren't, either.

10 Q. Yet, with getting that information, DuPont went ahead
11 and recommended sampling of its employees, correct?

12 A. Yes.

13 Q. And, in fact, you made recommendations to actually look
14 into the health records for those employees, correct?

15 A. Yes.

16 Q. Because there wasn't much information available to
17 DuPont at that time confirming what the safe levels of exposure
18 were for C-8, was there?

19 A. We had no reason to think that these employees' health
20 had been harmed at all by any exposure to C-8; but, as we
21 discussed this morning, based upon our intent to try to do an
22 appropriate -- provide an appropriate safe and healthful
23 workplace, we wanted to make sure we knew exactly what were the
24 circumstances, what were the fluorochemical levels in our
25 employees' blood and if, in fact, they had any health effects

1 that could be related to these. We had no reason to think that
2 they did, but we wanted to err on the side of prudence and look
3 and see if they did.

4 Q. And, in fact, you say that you had no evidence
5 indicating there was a health problem. You also had no
6 evidence, though, indicating there wasn't, correct?

7 A. That is correct, but you have to -- every DuPont
8 employee got a physical examination on a regular basis. If
9 they were 40 years of age or under, they got one every two
10 years, which included liver function tests, a complete exam by
11 a physician, chest x-ray, urinalysis, and any other test that
12 might have been indicated.

13 If they were over 40 years of age, they got one every
14 year, exactly the same thing, plus they got an
15 electrocardiogram every year.

16 We were able to monitor employee health by doing this on
17 a regular basis, physicians at the plant sites. And then we
18 could look and see if there were any abnormalities that were
19 showing up.

20 We also had an epidemiologic database in which we picked
21 up any type of illness that an employee may have for which they
22 lost eight days or more or anything that an employee or a
23 pensioner might die from. This was entered into our
24 epidemiologic database. And periodically, about every two
25 years, we would run that database and see if we had a plant

1 site that was showing any abnormality and causes of death or
2 adverse health effects that might be showing up. Plus, we had
3 the physical exams that the physicians were looking at.

4 And so we had a pretty good way to make sure that our
5 employees did not have a clustering of cases of some type of
6 adverse health effects.

7 But once we got these data that you reference here from
8 3M, then we felt that we needed to increase that surveillance a
9 little bit to make sure we weren't missing something, but we
10 were already doing a pretty extensive surveillance program.

11 THE COURT: Stop there. We are right up to five
12 o'clock.

13 Ladies and gentlemen, I thank you for your attention.
14 I'm not going to repeat all of the do's and don'ts, but please
15 keep them in mind. You've heard those several times now.

16 Have a nice evening. We'll see you back here to start
17 at nine o'clock tomorrow morning.

18 (Thereupon, the Jury exited the courtroom.)

19 THE COURT: I have a couple of things I want to go
20 over with you. Let me first ask, Mr. Mace, just in terms of
21 schedule, what do you anticipate where we are at this point?

22 MR. MACE: That's why I raised my hand, Your Honor.

23 We're going to give it a look-over tonight. But,
24 frankly, I see the jurors not only rolling their eyes at
25 side-bar, I think they rolled their eyes when they come in the

Vol. 12 - 290

1 courtroom. So, we are really thinking about cutting it back.
2 I want to look at some of these videos that are still being
3 discussed. But my current anticipation would be,
4 provisionally, that we're going to finish this video, call Dr.
5 Rickard, and we'll be done.

6 THE COURT: And I assume Dr. Rickard will take an
7 entire day. Would you anticipate --

8 MR. MACE: Probably a day between both sides.

9 THE COURT: All right. So you're confident we can
10 finish by Friday, is what it sounds like.

11 MR. MACE: I'm trying for that.

12 THE COURT: And in terms of rebuttal, how do you see
13 it?

14 MR. PAPANTONIO: Judge, I doubt we'll have rebuttal.
15 But I'm not so confident -- we'll finish on Friday, but that
16 would just be with testimony.

17 THE COURT: Right now -- I know things can change,
18 but, right now, you're not anticipating rebuttal?

19 MR. PAPANTONIO: No, sir.

20 THE COURT: All right. So we could finish with the
21 testimony this week and get this case to the jury early next
22 week?

23 MR. PAPANTONIO: Yes, sir.

24 THE COURT: Very good.

25 MR. MACE: We need to have a charge conference at some

1 point.

2 THE COURT: You're not just going to trust me to give
3 the instructions and -- I will tell you, before this trial is
4 over, how Judge Kinneary would do it. I don't think any side
5 would agree to that, but I'm not going to follow that habit.
6 He would just give them, and God help a person who objected.
7 That's -- we'll try to have a complete copy to you before the
8 weekend so you can take a look at it and we can move quickly
9 through those.

10 I would like to do close and the charge all in the same
11 day. How long are you thinking about for close? I know we're
12 jumping ahead here. What sort of timeline are you thinking of?

13 MR. PAPANTONIO: Yes, sir. We're looking at a way to
14 keep to the same two hours that we used for openings.

15 THE COURT: All right. Two hours each?

16 MR. MACE: That should be plenty, Your Honor.

17 THE COURT: All right. So, if we do two hours each
18 and the charge will take anywhere from 30 to 45 minutes, then
19 we could do all this in a day. The jury probably won't have a
20 lot of time to deliberate that first day, but at least they'll
21 have the case submitted and come back and have a full day the
22 next day.

23 All right. The other matter that had been mentioned at
24 side-bar we'd take up at this time has to do with an issue of a
25 juror possibly sleeping.

1 I have mentioned on the record several times at side-bar
2 that I've had some concerns. That's one reason why we've had
3 so many side-bars. I've also been paying closer attention to
4 him today. I think the unknown is that he does appear to close
5 his eyes, but when he opens, he's writing something. So I'm
6 not exactly confident and I'm not finding that he's sleeping,
7 but I can certainly say, from my observation, his eyes have
8 been closed from time to time.

9 So, with that, Mr. Papantonio, you were the one that
10 would like to raise that issue.

11 MR. PAPANTONIO: May I approach, Your Honor?

12 THE COURT: You may.

13 MR. PAPANTONIO: Judge, we have been somewhat in a box
14 with what to do with this juror.

15 As the Court pointed out, the last time we had a
16 side-bar the Court made the statement, and I totally agree, the
17 jury is at the point when they're rolling their eyes when we
18 ask for a side-bar. And it puts us -- and we've talked about
19 that among ourselves. It puts us at a pretty big disadvantage.

20 There are times besides the eight -- besides the eight
21 side-bars that the Court has recognized in this case where
22 we've had to stop the process and come forward, we have
23 recognized about the same number of times where it wasn't
24 appropriate, we didn't think, because we thought it was a
25 prejudice to our side to ask for a side-bar.

1 Here is the problem. This is our burden of proof.

2 Ms. Bartlett has the burden of proof here, Judge. And I've
3 provided you some case law. There is no reason for me to go
4 over that case law.

5 THE COURT: Well, the case law basically says that
6 it's somewhat discretionary. I think it's fundamental to a
7 fair trial --

8 MR. PAPANTONIO: Yes, sir.

9 THE COURT: -- that no one vote on a case if they
10 haven't heard all the evidence. I don't think anybody would
11 argue that point.

12 MR. PAPANTONIO: Well, the argument is that -- and to
13 add to that -- this is a complex case. This is not a typical
14 type of case; but, if you look at the case law -- and I have it
15 there -- I don't want to plow through the case law, but this
16 type of thing is akin to a form of juror misconduct. It can't
17 be expected that a juror is able to perform their duties if
18 they're asleep. And when a juror makes it impossible to
19 perform their duties, they should be removed from that -- from
20 that jury. It's an important -- it's an important part of the
21 proceeding. It goes to the very heart of due process. This is
22 the only time that Ms. Bartlett is going to have her case
23 heard.

24 And so to follow some of the reasoning here, it's
25 not -- if you look at the cases, jurors are removed simply for

1 nodding off once or twice. We now have -- in the material I've
2 given you, Judge, the analysis is very good. The analysis goes
3 about telling us that if there's no -- the person who is
4 prejudiced in a situation like that is the party that has the
5 burden of proof. Now --

6 THE COURT: In theory, that's true because, if the
7 case isn't proven, you lose.

8 MR. PAPANTONIO: Yes, sir.

9 THE COURT: That's the theory. I'm not necessarily
10 sure that's the reality.

11 MR. PAPANTONIO: I understand that. But the
12 point -- the jury has to be able to discharge their duty. And
13 if they're not -- if they're not wholly awake in a case like
14 this that's very complex, Judge, this has -- this case has been
15 dependent on video tapes, --

16 THE COURT: I'm paying attention. I'm just trying to
17 find the rule, but keep talking.

18 MR. PAPANTONIO: It's been dependent on video tapes,
19 Judge. It's been dependent on what I call compilation type of
20 presentations in very complex matters.

21 THE COURT: It is a complex case.

22 MR. PAPANTONIO: Yes, sir.

23 THE COURT: I think that's another factor that I would
24 certainly be focused on. The more complex case, the more
25 important it is for the jurors to follow it.

1 MR. PAPANTONIO: The numbers of documents alone,
2 Judge, I've lost track of them, frankly. And I didn't look at
3 it before I came here. But it's been so necessary to even use
4 composite material, and what we've done is, we've been very
5 precise in that motion that we've given you.

6 In the motion we've given you, we've gone back and
7 actually looked at what was happening during the eight times
8 that the Court had to stop and say, look, let's come up here
9 and have a side-bar and give the jury a chance to wake up.

10 This isn't rampant. And sometimes you'll see a jury
11 that everybody is asleep. That is not the case here. We've
12 actually observed, Judge, and I think everybody who's been
13 paying attention to this has observed where other jurors have
14 almost nudged this guy.

15 Juror #4 keeps looking at Juror #2 at whether he's awake
16 during critical times of the testimony. And the genie is out
17 of the bottle at this point. We can't go back and say --

18 THE COURT: Just assume that I share the concerns.
19 All right? And I think the argument that you have a right to a
20 jury that's heard the evidence is unassailable. Having said
21 that, the doubt that I have in my mind is not so much the legal
22 standard. It's knowing or not knowing just how much of this
23 trial the juror has absorbed, because I can't, truthfully,
24 tell, when his eyes are closed, whether he is sleeping or
25 whether he is simply -- some people can still listen and pay

Vol. 12 - 296

1 attention and not fall asleep. I know I'm not one who could do
2 that.

3 What would you think of the option of me telling him
4 that I'm the only one who wanted to talk to him, no one else
5 has asked for this, and I sit down and talk to him in camera,
6 but on the record, and ask him has he been able to keep track
7 of the evidence, has he been following asleep for periods of
8 time that would block him from knowing main parts of the case,
9 and see what his response is?

10 MR. PAPANTONIO: Judge, even though the Court might do
11 that, the chances of us being prejudiced -- we have a fifty
12 percent chance of being prejudiced by that. We've interrupted
13 this case to go forward and make an issue out of this. We've
14 done side-bars.

15 THE COURT: But I mean -- I just tell you, when I try
16 cases -- and I'm sure you've had the same experience -- this
17 happens from time to time, particularly after lunch. And
18 oftentimes a side-bar is all it takes. Someone gets on their
19 feet. Their eyes are open and we go forward. This has been a
20 recurring problem, as I've mentioned this at side-bar. So I
21 don't disagree as to what the record shows at this point.

22 MR. PAPANTONIO: And in a setting like this, we've
23 actually had jurors removed for that very reason, especially
24 when it reached the complexity of this. This is not a
25 fender-bender. If this juror misses one major element of this

1 case -- if he was -- for example, we have a cite in there
2 where, during Dr. Bahnsen, that was a time when we had to wake
3 him up. Dr. Bahnsen was talking about causation in this case
4 that the defendant has made a major part of their case.

5 THE COURT: Right.

6 MR. PAPANTONIO: And for Mrs. Bartlett to have to
7 guess was he -- how often did that happen is just not
8 appropriate, Judge.

9 And if we had a problem where we didn't have enough
10 jurors, but we can go forward with seven jurors, and there's no
11 prejudice; there is no question of prejudice whatsoever.

12 The other thing -- I want to put this -- I want to be
13 clear about this. From day one -- and you're certainly welcome
14 to take testimony from Mrs. Bartlett about this. From day one,
15 Ms. Bartlett has said to me, The man is sleeping. How is he
16 paying attention?

17 THE COURT: Well, again, my position is this is on the
18 record. I've mentioned this at side-bar. No one's -- you
19 know, I think we've all seen the same thing.

20 I think the only issue in my mind is do we take a
21 remedial step first. That's one question. The other question
22 is --

23 MR. PAPANTONIO: I genuinely believe we're more
24 prejudiced with that.

25 THE COURT: All right.

Vol. 12 - 298

1 MR. PAPANTONIO: I genuinely believe that, Judge. I'm
2 not -- I'm not just imagining that.

3 THE COURT: Well --

4 MR. PAPANTONIO: We don't know what's been said among
5 these jurors. The side-bar issue does become -- the side-bar
6 is the best approach to a trial like this. It works. But
7 there has been times where I've felt like we couldn't do a
8 side-bar. And I've had to tell co-counsel we can't go up -- we
9 can't keep jumping up there. We can't keep asking for
10 side-bars. It's destructive to do that.

11 THE COURT: All right.

12 MR. PAPANTONIO: And it's actually had an impact on
13 our strategy.

14 THE COURT: Thank you. I understand your position.
15 You get the last word.

16 Mr. Mace?

17 MR. MACE: Ms. Niehaus will be addressing it.

18 THE COURT: Ms. Niehaus.

19 MS. NIEHAUS: Thank you, Your Honor. Just a couple
20 points in response.

21 One, you mentioned that you think this is a somewhat
22 discretionary standard. In fact, the cases indicate that you
23 have great discretion in this area.

24 THE COURT: Right. It's a good cause standard, and
25 it's the use of discretion on appeal.

1 MS. NIEHAUS: Right.

2 THE COURT: I want to get this right.

3 MS. NIEHAUS: Okay.

4 THE COURT: I understand -- you know, I don't think
5 this is one-sided, by the way. I could imagine a person who's,
6 just hypothetically -- I'm not talking about Juror #2 -- the
7 other jurors would probably say, What do you know? You slept
8 through half this trial. They would discard his opinion, would
9 be -- I think that's the most likely outcome, but I'm
10 speculating, I will be the first to admit.

11 I also think that if I were in your position I would
12 fear that, you're at opening statement, slept through the
13 trial, and just relied on that in making a decision, which we
14 all know is completely improper.

15 It just seems to me that this is sort of a ricocheting
16 bullet here, and any one of you can be hit with it. I don't
17 think it's necessarily the plaintiff's -- it's not the
18 plaintiff who is the only party at risk.

19 MS. NIEHAUS: Sure. But especially given where we're
20 at in the trial, Your Honor. We have maybe a day or two left
21 of testimony. There is only a down side to letting him
22 continue.

23 The cases speak to curative measures. You've done some
24 of that. You've called side-bars.

25 THE COURT: The trouble is this is -- I'm not going to

1 use the example that came to my mind. It would -- but what I
2 tried was curative, but it's sort of like giving a patient the
3 same medicine for 360 days and the temperature is still very
4 high. It hasn't worked.

5 MS. NIEHAUS: Sure. Well, I mean, you've suggested
6 having them bring in coffee.

7 THE COURT: Right.

8 MS. NIEHAUS: We think that's the next step, at least,
9 in the curative measures.

10 THE COURT: But we've been through, now, 13 -- 12 days
11 of trial, and this would be the last two days.

12 MS. NIEHAUS: Sure.

13 THE COURT: I would be fearful that we just didn't
14 absorb enough of the testimony with that juror during the other
15 days.

16 MS. NIEHAUS: Sure. But in any event, Your Honor, the
17 cases speak to curative measures. They also suggest that,
18 before a juror is actually dismissed, you need to take the
19 steps that you've sort of outlined here, and that is to ask him
20 has he actually listened to the testimony, has he appreciated
21 the testimony --

22 THE COURT: Yeah.

23 MS. NIEHAUS -- perhaps review the notes that he's
24 taken.

25 As you pointed out, he's taken notes, so -- you know,

1 what is he writing down? Is he writing down -- is he writing
2 down the evidence? That's some evidence that he's paying
3 attention to the evidence.

4 THE COURT: What's the -- what prejudice would there
5 be? I know we've talked before about the number of jurors, and
6 your side advocated nine. We went with eight.

7 MS. NIEHAUS: Right.

8 THE COURT: But the rule only requires six. It can be
9 as many as 12, but it's discretionary with me. And seven
10 jurors who heard all of the testimony versus an eight jury
11 group with one juror that we have great fear didn't hear all of
12 the testimony, how would that in any way harm the case?

13 MS. NIEHAUS: Your Honor, we don't know if he's heard
14 all of the testimony. We haven't had an opportunity, or you
15 haven't had that opportunity, to ask him in camera.

16 THE COURT: Yeah. My fear, truthfully -- I don't
17 think would argue this -- we've had side-bars. I've told the
18 jurors that they may stand. And he continues with closed eyes
19 and doesn't stand. You've seen that, I'm sure, right?

20 MS. NIEHAUS: Sure. He engages with the deputy clerk
21 when the deputy clerk goes over.

22 THE COURT: Right.

23 MS. NIEHAUS: And he does wake up. And as you've
24 pointed out, the times that he appears to be nodding off, he
25 does perk back up and takes notes.

1 THE COURT: He does do that. That's his one saving
2 grace at this point.

3 MS. NIEHAUS: Your Honor, we did request nine jurors.

4 THE COURT: Right.

5 MS. NIEHAUS: We think we were prejudiced in not
6 having nine jurors. So, to go from nine to seven, then,
7 without even any additional information on whether this juror
8 has been paying attention or has been paying attention
9 sufficiently enough to consider the evidence I think compounds
10 the prejudice.

11 THE COURT: I knew this was an important matter. I've
12 only had one other case where I've excused a juror. It wasn't
13 for sleeping. It was for another matter altogether.

14 I want to think about it over the night. If I do talk
15 to him, it will be in the morning. And I would say, if I do
16 talk to him, it's because I'm probably leaning towards excusing
17 him. But I might just hang on a thin reed and see what he says
18 before we do that, because he has put a lot of time in here,
19 and I wouldn't want to have him do that for naught.

20 But at this point -- this is in writing. I think the
21 case law is exactly as you've described. It's discretionary.
22 It's a just cause standard.

23 Do you need a chance to respond to this?

24 MS. NIEHAUS: In writing?

25 THE COURT: Yeah. You don't need to.

1 First of all, the factual basis is everything we've
2 talked about. We've all been at side-bar together. You know
3 what I've put on the record. I don't think you don't need to
4 address that. But if you have some great concern -- I won't
5 make a final decision before 8:30 tomorrow, but it's going to
6 be pretty close to 8:30.

7 What I'd want to do is meet with him, if I'm going to do
8 that, probably about 8:50.

9 MS. NIEHAUS: Your Honor, I would say I did skim it,
10 as much as I could in the five minutes and also pay attention
11 to Mr. Papantonio. I noticed that one of the concerns is that
12 Dr. Rickard is coming up and that he's a critical witness in
13 the case. And we don't dispute that, of course.

14 I'd ask that if you do speak with him and ask him to
15 stay awake, that he at least be permitted to continue through
16 the duration of the trial and, you know, listen to that
17 critical witness.

18 THE COURT: One other thing to put on the record --
19 this is in the *voir dire*, and it's always in his jury
20 questionnaire -- he is on Worker's Compensation. Nobody asked
21 him if he's taking medication, but I wouldn't be surprised. It
22 was a physical injury to the knee, if you remember.

23 MS. NIEHAUS: Yes.

24 THE COURT: So he could very well be taking pain
25 medication that is making him sleepy. So I don't want to make

1 the record look like I'm criticizing him. He may just be in
2 that spot.

3 MS. NIEHAUS: Sure.

4 THE COURT: But I don't -- I just want to see if he's
5 been able to absorb most of the case. That's going to be the
6 focus. And if he says he's had a rough time with it, I'm going
7 to be inclined to dismiss him.

8 MR. MACE: That's obviously fine, Your Honor. I want
9 to note for the record, I've had some other observations with
10 at the side-bar. Some of those have been recorded, and I've
11 certainly noticed him, appear to be, his eyes closed, but then
12 he's writing something down.

13 THE COURT: There has been some of that. But there
14 have been lots of times when I've noticed -- and I've already
15 put this on the record -- as we were going through each day.
16 So this is -- I think we all understand this was not a one-time
17 occurrence. I had that happen a lot, and people are shaken up
18 once and then they tend to get the message, but that hasn't
19 happened here. So --

20 Okay. I'll give it some more thought. Try to get it
21 right.

22 You can have the last word, Mr. Papantonio.

23 MR. PAPANTONIO: May I make one request, Judge?

24 I realize this is your court, but we would request
25 if -- rather than asking him any questions, if the Court

Vol. 12 - 305

1 decided that there was even a possibility that he was going to
2 stay, that he not be interviewed, because I really -- I
3 sincerely believe we're prejudiced by that. I sincerely
4 believe that.

5 THE COURT: All right. Well, you know, I will tell
6 you this much: If I decide to interview him, it will be
7 because I'm inclined to excuse him.

8 MR. PAPANTONIO: Yes, sir.

9 THE COURT: I wouldn't do this just as a neutral
10 proposition, but I think I owe him at least a talk before I
11 send him off after almost three weeks here.

12 All right. With that, we'll be in recess. I'll see you
13 at 8:30 in the morning.

14 (Proceedings adjourned at 5:20 p.m.)

15 - - -
16
17
18
19
20
21
22
23
24
25

Vol. 12 - 306

1 I N D E X
2
3
4

- - -

5 WITNESSDIRECT CROSS REDIRECT RECROSS

6 Michael Dourson

7 By Mr. Mace

22

109

8 By Mr. Douglas

53

124

9 Samuel Cohen

10 By Mr. Mace

132

258

11 By Mr. Douglas

212

269

12 Bruce Karrh

13 By Mr. Bilott

275

- - -

14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

United States of America

Southern District of Ohio

We, Shawna Evans, Lahana Dufour, Georgina Wells and Denise Errett, Official Court Reporters of the United States District Court for the Southern District of Ohio, do hereby certify that the foregoing constitutes a true and complete transcription of our stenographic notes taken of the proceedings held in the afore-captioned matter on the 30th day of September, 2015.

In testimony whereof, we hereunto set our hands on the 1st day of October, 2015.

/S/Shawna Evans, RMR
Shawna Evans, RPR
Official Court Reporter
Southern District of Ohio

/S/Lahana Dufour, RMR
Lahana Dufour, RPR
Official Court Reporter
Southern District of Ohio

/S/Denise Errett, FCRR
Denise Errett, FCRR
Official Court Reporter
Southern District of Ohio

Georgina Wells, RPR
Georgina Wells, RPR
Official Court Reporter
Southern District of Ohio